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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~000~~. 333

JENS THOMMESSEN AND JULIUS SMITH, OWNERS OF THE NORWEGIAN BARK "DAPHNE," APPELLANTS,

vs.

MARK WHITWILL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 5, 1883.

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No. 636.

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1 At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court-rooms in the city of Brooklyn, on the 27th day of March, in the year of our Lord one thousand eight hundred and seventy-six.

Present: The Honorable Charles L. Benedict, district judge.

JENS THOMMESEN *et al.*, Libellants,
vs.
MARK WHITWILL *et al.*, Respondents.

The libellants above named appear and file their libel against Mark Whitwill *et al.*, in the words and figures following, to wit:

To the Hon. Charles L. Benedict, judge of the district court of the United States for the eastern district of New York:

The libel and complaint of Jens Thommesen and Julius Smith, of Arendal, Norway, owners of the bark Daphne, her tackle, &c., on behalf of themselves and of the owners of the cargo laden on board of said bark Daphne, as the common carriers thereof, against Mark Whitwill and John Doe, comprising the firm of Mark Whitwill & Co., of Bristol, England, owners of the steamship Great Western and the Great Western Steamship Line, in a cause of collision, civil and maritime, allege as follows:

2 First. That this is an action for collision, and the libellants are the owners of the bark Daphne, and the respondents at the times hereinafter mentioned were the owners of the steamship Great Western.

Second. That on the night of March 24, 1876, while said bark Daphne was at sea, and loaded with a full cargo of crude petroleum oil, and bound on a voyage from Baltimore, Md., to Marseilles, France, under command of a competent master, officers, and crew, with her lights set and burning brightly, and with all sails set, and with a proper lookout forward, the said bark being about 601 miles east southeast from Sandy Hook, and the wind blowing a moderate breeze from the east southeast, and the bark heading by the wind, on a course northeast, about midnight those in charge of said bark sighted from their starboard side, and to the leeward of said bark, and about five miles distant, a large steamship, which afterwards proved to be the Great Western, heading in a northwest by west course across the course of the said bark.

That said bark continued on her course, and the said steamship came on, and in spite of the hail and cries of the men on board of said bark ran into her, striking the said bark, on her starboard side, right aft the fore rigging, a heavy blow, and cutting and staving her side in with the bow of said steamship Great Western, and doing other and serious damage to said bark and her cargo, which is not yet accurately known.

That the said steamship backed out from said bark, and after a short time went on her way, and these libellants and the master of said bark have not seen said steamship since.

That those in charge of said bark did all in their power to

3 keep said vessel above water, and changed her course for Sandy Hook and New York, where the said vessel arrived last evening at seven p. m., in a badly damaged condition.

Third. That said collision, as these libellants are informed and believe, was caused wholly by the carelessness and negligence of those in charge of said steamship Great Western, among other things in not seeing said bark, and in not having a proper and competent lookout, and in attempting to cross the course of a sailing vessel, as said bark was, and in not going under the stern of said bark as the rules provide, when there was plenty of room therefor, and for other faults and negligences which these libellants will point out on the trial of this action, and was not caused by any fault or negligence on the part of these libellants, nor of those in command and charge of said bark Daphne.

Fourth. That, as these libellants are informed and believe, it will cost the sum of twenty thousand dollars to repair the damage done to said bark, and the loss and damages done to the cargo has not yet been fully ascertained, but will amount to a large sum.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellants pray that process in due form of law may issue against the respondents, and that they be compelled to appear and answer the allegations of the libel, and, in case they cannot be found, that their goods and chattels and property to the amount sued for be attached, and that the respondents be compelled to pay the libellants' claim, with costs.

JENS THOMMESEN,
JULIUS SMITH,
By ANDREAS T. NIELSEN.

4 EASTERN DISTRICT OF NEW YORK, *ss:*

Andreas T. Nielsen, being duly sworn, says: That he is the agent for the libellants, being the master of said bark. That he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge. That the reason this verification is made by defendant is that the said libellants are residents of Norway, and are not in this country.

ANDREAS T. NIELSEN.

Sworn to before me, this 28th day of March, 1876.

B. LINCOLN BENEDICT,
U. S. Commissioner.

JAMES K. HILL,
Proctor for Libellants.

Endorsed: Libel. Let process, with clause of attachment, issue as prayed for in within libel. March 27th, 1876. Chas. L. Benedict. Filed March 27, 1876.

5 U. S. District Court, Eastern District of New York.

JENS THOMMESEN *et al. vs.* MARK WHITWILL *et al.*

SIRS: Please take notice that we are retained by and appear for the respondent, Mark Whitwell, in this action, and demand that all papers herein be served on us at our office, 69 Wall street, New York.

Dated March 29, 1876.

Yours, &c., FOSTER & THOMSON,
Proctors for the Respondent, Mark Whitwell.

To James K. Hill, Esq., Proctor for libelants. B. Lincoln Benedict, Esq., clerk.

Endorsed: Notice of appearance. Filed March 29, 1876.

6 The President of the United States of America to the marshal of the eastern district of New York, Greeting:

Whereas a libel has been filed in the district court of the United States of America for the eastern district of New York, on the 27th day of March, in the year of our Lord one thousand eight hundred and seventy-six, by Jens Thommesen *et al.* against Mark Whitwill and John Doe, owners of the steamship "Great Western," and the Great Western Steamship Line, in a certain action, civil — maritime, for damages therein alleged to have been caused by said respondents to the said libellant, amounting to twenty thousand dollars, and praying that a citation may issue against the said respondents with clause of foreign attachment, pursuant to the rules and practice of this court:

Now, therefore, we do hereby empower and strictly charge and command you, the said marshal, that you cite and admonish the said respondents, if they shall be found within the jurisdiction of said district court, that they be and appear before the said district court on the 5th day of April, 1876, at the United States court-rooms in the city of Brooklyn, then and there to answer the said libel and to make their allegations in that behalf, and, if the said respondents cannot be found, that you attach their goods and chattels to the amount sued for; and have you then and there this writ with your return thereon.

Witness the Honorable Charles L. Benedict, judge of said court, this 27th day of March, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the 100th.

B. LINCOLN BENEDICT, *Clerk.*

JAS. K. HILL, *Proctor.*

7 Endorsed: Process in personam, with clause of foreign attachment. Respondents not found, and in obedience to the within monition I attached the steamship "Cornwall," property of the said respondents. J. R. Harlow, U. S. marshal. Filed April 5th, 1876.

Stipulation for Claimants' and Respondents' Costs, entered into pursuant to the Rules and Practice of this Court. Filed the 29th day of March, 1876.

District Court of the United States for the Eastern District of New York.

Whereas a libel was filed in this court on the 27th day of March, in the year of our Lord one thousand eight hundred and seventy-six, by Jens Thommesen and ——— Smith against Mark Whitwill and others for the reasons and causes in the said libel mentioned, and praying that process may issue with clause of foreign attachment, and the parties hereto, hereby consenting, that in case of default or contumacy on the part of the respondents or their sureties, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands;

And whereas, also, an appearance has been filed in said cause by Foster & Thomson, proctors for respondents:

Now, therefore, it is hereby stipulated and agreed for the
8 benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the respondent above-named and others shall pay all costs and expenses which shall be awarded against them by the final decree of this court or, upon an appeal, by the appellate court.

MARK WHITWILL,
By W. D. MORGAN.
W. D. MORGAN.
C. L. MORGAN.

Taken and acknowledged this 29th day of March, 1876, before me.

EDWARD L. OWEN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles L. Morgan and William D. Morgan, parties to the above stipulation, being duly sworn, doth depose and say, and each for himself says, that he resides in the city of New York; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

W. D. MORGAN.
C. L. MORGAN.

Sworn to this 29th day March, 1876, before me.

EDWARD L. OWEN,
U. S. Commissioner.

9 *Stipulation for Value, entered into Pursuant to the Rules and Practice of this Court. Filed the 29th day of March,* 1876.

District Court of the United States for the Eastern District of New York. In Admiralty.

Whereas a libel was filed on the 27th day of March, in the year

of our Lord one thousand eight hundred and seventy-six, by Jens Thommesen and —— Smith against Mark Whitwill and John Doe, composing the firm of Mark Whitwill & Co., owners of the steamship Great Western, and the Great Western Steamship Line, for the reasons and causes in the said libel mentioned; and whereas the steamship Cornwall has been attached under a clause of foreign attachment in said suit, and said steamship is in the custody of the marshal, under the process issued in pursuance of the prayer of said libel; and whereas an appearance has been filed by Foster & Thomson, Esqs., proctors for respondent, Mark Whitwill, and the value of said steamship has been fixed by consent at twenty-five thousand dollars, as appears from said consent, now on file in said court; and the parties hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the respondent, Mark Whitwill, or his sureties, execution for the above-agreed value, with
10 interest thereon from this date, may issue against their goods, chattels, and lands:

Now, therefore, the condition of this stipulation is such, that if the stipulators undersigned shall, at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to Foster & Thomson, Esqs., proctors for the respondents, abide by and pay the money awarded by the final decree rendered by the court, or the appellate court if any appeal intervene, then this stipulation to be void; otherwise, to remain in full force and virtue.

MARK WHITWILL,
By W. D. MORGAN.
W. D. MORGAN.
S. W. CAREY.

Taken and acknowledged, this 29th day of March, 1876, before me.
EDWARD L. OWEN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Stephen W. Carey and William D. Morgan, parties to the above stipulation, being duly sworn, depose and say, and each for himself says, that he is worth the sum of twenty-five thousand dollars, over and above all his just debts and liabilities.

W. D. MORGAN.
S. W. CAREY.

Sworn to, this 29th day of March, 1876, before me.
EDWARD L. OWEN.
U. S. Commissioner.

11 The foregoing bond approved.
JAS. K. HILL,
Proctor for Libellants.

Notice to the Marshal.

United States District Court.

JENS THOMMESEN *et al. vs.* MARK WHITWILL.

SIR: The S. S. "Cornwall," attached by you in the above cause, having been bonded, and the costs of the clerk and commissioner having been paid, you will discharge the said S. S. "Cornwall" from your custody upon payment of your fees.

Dated March 29th, 1876.

Yours, &c, B. LINCOLN BENEDICT, *Clerk.*

To S. R. Harlow, United States Marshal.

12 To the Honorable Charles L. Benedict, judge of the district court of the United States for the eastern district of New York:

The answer of Mark Whitwell, respondent to the libel and complaint of Jens Thommesen and Julius Smith, owners of the bark Daphne, her tackle, &c., in behalf of themselves and of the owners of the cargo laden on board of said bark, as the common carriers thereof against Mark Whitwell and John Doe, comprising the firm of Mark Whitwell & Co., of Bristol, England, owners of the steamship Great Western, and the Great Western Steamship Line, in a cause of collision, civil and maritime, and thereupon said respondent, answering, allege- and articulately propounds as follows:

First. He has no knowledge or information sufficient to form a belief as to the ownership of the bark Daphne, as alleged in the first article of said libel, and he therefore denies such allegation.

Second. He admits that himself and others were, at the date referred to in the second article of said libel, the owners of the steamship Great Western.

Third. He is ignorant of the matters alleged in the second article of the said libel, and he therefore denies the same.

Fourth. He denies, upon information and belief, the allegations made in the third article of said libel, and alleges, upon information and belief, that the damage occasioned to said bark by colliding with the steamer Great Western, if any such damage there was, was caused by the carelessness and negligence of those in charge of said bark. Among other things in this, that at the time when said bark and said steamer were pursuing parallel or nearly parallel courses, and headed in the same or nearly the same direction, and only a few yards apart, and just previous to the time of such collision,

13 while said steamer was under a higher rate of speed than said bark, and when the bow of said steamer was upon a line just abaft fore rigging of said bark, and the said steamer was in the act of passing said bark, the said bark, instead of pursuing her course and allowing said steamer to pass, changed her course abruptly across the bow of said steamer, thereby causing the two vessels to collide.

Fifth. He denies the allegations contained in the fourth article of

said libel, and he alleges, upon information and belief, that the damage done to said bark and her cargo was, if any, very slight.

Sixth. He denies the allegations made in the fifth article of said libel, and alleges, upon information and belief, that this honorable court has no jurisdiction of the matters alleged in said libel.

Seventh. He alleges, upon information and belief, that ifthe matters alleged in said libel be true, and the libellants claim for damages resulting to said bark or her cargo, or both, from the alleged collision shall be established herein against this respondent, the liability of this respondent therefore is limited to the amount or value of his interest in the said steamer Great Western and her freight upon the voyage during which such collision occurred, and this respondent's said interest in said steamer and freight is of no value whatever.

Wherefore the respondent prays this honorable court would be pleased to pronounce against the libel aforesaid, and otherwise right and justice to administer in the premises, and that he may be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

MARK WHITWELL,
By W. D. MORGAN, *Agent.*

FOSTER [&] THOMSON, *Proctors for the Respondent.*

14 DISTRICT OF NEW YORK, *ss*:

WILLIAM D. MORGAN, being duly sworn, says he is the agent for the respondent, Mark Whitwill; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge; that the reason why this verification is made by deponent is that said respondent is a resident of England and is not in this country.

W. D. MORGAN.

Sworn before me, this 25th day of November, 1876.

WM. T. MORRIS,
Notary Public, N. Y. and Kings Co.

Endorsed: Answer. Filed November 25th, 1876.

15 U. S. District Court.

JENS THOMMESEN *et al.*
vs.
MARK WHITWELL, impleaded, &c.

SIR: Please take notice that on the pleadings and proceedings in this cause, and the affidavit, a copy of which is hereto annexed, we shall move this court, at the opening thereof on the 13th of December inst., or as soon thereafter as counsel can be heard for an order, that the court decline to entertain jurisdiction of the action, and that the libel be dismissed by reason of such refusal to entertain jurisdiction, or for such other or further order or relief as shall be just.

Yours, &c., FOSTER & THOMSON,
Proctors for Respondent, Mark Whitwill.

To James K. Hill, Esq., Proctor for Libellants.

16 U. S. District Court, Eastern District of New York.

JENS THOMMESEN *et al. against* MARK WHITWILL *et al.*

CITY AND COUNTY OF NEW YORK, *ss:*

WILLIAM D. MORGAN, being duly sworn, says that he is the agent of Mark Whitwill, one of the defendants herein.

That said Mark Whitwill is and was at the commencement of this suit a British subject, resident and domiciled at Bristol, in England.

That this action is brought against said Mark Whitwill & Co. as owners of the steamship Great Western and the Great Western Steamship Line; that the Great Western Steamship Line is an association composed entirely of British subjects, resident and domiciled in England; that only Mark Whitwill has appeared in this action; that this action is brought by Jens Thommesen and Julius Smith, who are subjects of the King of Sweden and Norway, and residents and domiciled in Orendal, in Norway, and are neither of them in this country, nor were they when this suit was commenced, as this deponent is informed and believes; that the action is brought to recover for damages occasioned by a collision between the barque Daphne, owned by the said Thommesen and Smith, and the steamship Great Western, of which the said Mark Whitwill was only one of the owners; that said collision occurred on the high
17 seas in March last; that the plaintiffs have attached the interest of said Mark Whitwill alone in another vessel, and said Whitwill has been compelled, in order to release the same, to appear in this action, and to give security to pay the whole of the said libellants' claim, whereby the said Whitwill is compelled to bear the whole burden of a litigation which should rest upon all the owners of the Great Western.

That the other owners of the steamship Great Western are, as your deponent is informed and believes, all British subjects, and all resident and domiciled in England, and all are men of large means and able to respond to any judgment that may be obtained against them for such collision.

W. D. MORGAN.

Sworn to before me, this 6th day of December, 1876.

WM. T. MORRIS,
Notary Public, N. Y. and Kings Co.

Endorsed: Affidavit and notice of motion. Due service of a copy of the within affidavit and notice of motion is hereby admitted. 6 Dec., 1876. Jas. K. Hill, proctor for libellants.

18 United States District Court, Eastern District of New York.
In Admiralty.

JENS THOMMESEN and JULIUS SMITH, Libellants,
against
MARK WHITWILL *et al.*, Respondents.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

HENRY T. WING, being duly sworn, says: That he has had ex-

clusive charge of the above-entitled suit for the proctor for the libellants herein.

That the libel herein was filed on the twenty-seventh day of March, 1876, by Jens Thommesen and Julius Smith, of Arendal, Norway, as owners of the bark Daphne, on behalf of themselves and of the owners of the cargo laden on board said bark, as the common carrier of the same, against Mark Whitwill & Co., of Bristol, England, owners of the steamship Great Western, in a cause of collision, civil and maritime, for the recovery of damages done to said bark and cargo, from said bark (on the night of March twenty-fourth, 1876, while at sea, and loaded with a full cargo of petroleum oil, and bound on a voyage from Baltimore, Maryland, to Marseilles, France, and about one hundred and sixty miles east southeast from Sandy Hook), being run into by the said steamship Great Western, as is more fully set forth in the said libel.

19 That the said libel prayed that process in due form of law might issue against the respondents therein named, and that they be compelled to appear and answer the allegations of the said libel, and, in case they could not be found, that their goods and chattels and property to the amount sued for be attached, and that the respondents be compelled to pay the libellants' claim with costs.

That said libel was duly verified by the captain of said bark Daphne, Andreas T. Nielsen.

That it appearing to the judge of this court that the respondents could not be found in this district, he directed that process, with a clause of attachment, issue as prayed for in said libel, and such was accordingly, on the twenty-seventh day of March, 1876, issued from this court to the marshal, returnable before this court on the fifth day of April, 1876.

That on the 29th day of March, 1876, the respondent, Mark Whitwill, caused his appearance in writing in this action to be filed with the clerk of this court, by Messrs. Foster & Thompson, as his proctors, the same being a full and unqualified appearance, as will appear from the notice to enter their appearance with the clerk, to which reference is had for its contents, and on the same day served a copy of notice on the proctor for the libellants, which is as follows, after entitling it in the suit, viz:

"SIR: Please take notice that we are retained by and appear for the respondent, Mark Whitwill, in this action, and demand service on us of all papers herein, at our office, 69 Wall street, New York.

"Dated March 29, 1876.

"Yours, &c.,

"(Sig.) FOSTER & THOMPSON,
"*Proctors for Whitwill.*

"To James K. Hill, Esq., Proctor for Libellant."

20 That on the same day, to wit, March twenty-ninth, 1876, a bond, duly executed and acknowledged for value, with sureties, was given on behalf of said Whitwill, on file with the clerk, for the

amount sued for, and thereupon the property attached by the marshal was released by him, and in addition thereto then and there a stipulation in writing was signed by the proctors for said Whitwell, entitled in the suit in the words and figures following, to wit:

"We hereby consent and agree that the bond given herein on the twenty-ninth day of March, 1876, for the sum of twenty-five thousand dollars shall be deemed and taken as security for any damages which the libellant may recover herein, not exceeding that sum.

"Dated New York, March 29, 1876.

(Sig.) "FOSTER & THOMPSON,

"*Proctor for Respondent, Mark Whitwill.*"

That the object and intent of this stipulation was to waive all objections to the competency of the parties or the process, and to subject the bond given on the release of the property attached to the jurisdiction of the court as an absolute security for the damages to be awarded by the court.

That on the third day of April, 1876, the proctor for the libellants was served with a copy of the notice, to the effect that the testimony of Samuel Wyndham, George J. Fox, and George Hill would be taken *de bene esse* as witnesses on the part of the respondent before Edward L. Owen, Esq., United States commissioner, at his office, No. 71 Wall street, on April fourth, 1876, at 2 p. m. That deponent gave admission of service thereof, and on the fourth and fifth days of said April deponent attended at the place named and cross-
21 examined said witness; that deponent then met the late Edward H. Owen, Esquire, who acted as counsel for the proctors for the respondent, and examined the witnesses before named, and the testimony of said witnesses, taken as aforesaid, was filed in this court on the eleventh day of April, 1876.

That from the testimony of respondents' said witnesses it was very evident, as the court, by reading the same can perceive, that the collision was caused through the carelessness and fault of the Great Western.

That respondents' proctors and counsel were aware of the same, and, as this deponent was given to understand, did not intend to interpose a defence to the action, except as to amount of the damages done to libellants' vessel.

That the captain of said steamer Great Western testified in his deposition taken as aforesaid that the whole number of officers and crew in the Great Western, at the time of the collision, was thirty-five, and that all of them, except the three witnesses named in the above notice, were sent back to England from New York in the steamship Cornwall, the sister ship of the Great Western, on March twenty-ninth, 1876.

That after said depositions were taken as aforesaid deponent said to Mr. Owen that there could be nothing in the case, except the amount of damages to be determined, and that Mr. Owen replied that "that was so," or "that that was what it would come to," and thereupon deponent said, "why not then enter an interlocutory decree and save time," and that Mr. Owen said, "wait awhile; take

the testimony of your witnesses first, and then we will fix the matter."

That on the fifth day of April, 1876, the day that said process was returnable before this court, the marshal made return as follows:

"Respondents not found, and in obedience to the within
22 monition I attached the steamship Cornwall, property of the said respondents.

(Sig.) "S. R. HARLOW,
"*U. S. Marshal.*"

That on the tenth day of April, 1876, deponent caused to be served on the proctors for the respondent a notice of taking the testimony of nine witnesses, the same being all the officers and crew of the said bark Daphne, on the part of the libellants, before E. L. Owen, Esquire, on April eleventh, and the testimony of seven of said witnesses was duly taken and filed in this court.

That from all the testimony so taken as aforesaid there can be no question whatever that the collision in question was caused solely through the carelessness and fault of the steamship Great Western, as alleged in the libel, as this deponent believes will appear therefrom.

That after alll the testimony was taken as aforesaid deponent applied to Mr. Owen for a consent to an interlocutory decree herein, and that Mr. Owen put deponent off each time, with the request that deponent wait awhile; that although the only question involved was the ascertainment of damages, yet deponent must not press too hard, for there would be time enough, and the case might be settled, &c., &c.

That deponent became engaged in other matters, and nothing more was said or done about the same until the beginning of September last, when deponent again spoke to Mr. Owen, and he replied that he was going away for a short time on account of his health, and on his return the matter should be fixed up at once.

That afterwards Mr. Owen died, and then deponent applied to the proctors for the respondent, and was told by them that they
23 would either settle the case or consent to an order of reference to ascertain the damages, if we could not agree upon the amount; that the first thing was for deponent to let them have a list of the items of damage done to the Daphne and cargo, and then they would look into it.

That accordingly deponent obtained the bills for the repairs of said vessel and cargo, and sent a statement of most of the items to Messrs. Foster & Thomson, and they, after a few days, returned same with thanks, and said that they would send their estimate in a few days. That deponent waited, and, after five or six weeks had elapsed, Mr. Foster, of the firm of Foster & Thomson, informed deponent that they had heard from their clients, and he was prepared to offer deponent five thousand dollars in settlement of the suit. That deponent declined this at once, and asked Mr. Foster if he would consent to the order of reference to compute the damages, and said Foster replied, "Yes," without any reservation whatsoever.

That deponent went at once to his office and prepared the usual interlocutory decree, and took it to said Foster for his signature, and that said Foster requested deponent to leave it; that he wished to confer with his client about it; that he would sign and send it to deponent.

That a few days after this deponent received from the said firm of Foster & Thomson the said proposed decree, with another proposed decree signed by them, with a letter, of which the following is a copy, viz:

"Office of Foster & Thomson,
"Att'ys and Counsellors at Law, 69 Wall St.
"P. O. Box 1354.

"NEW YORK, 16 *Nov'r*, 1876.

"H. T. Wing, Esq.

24 "DEAR SIR: We enclose order of reference in Daphne matter, which we think will carry out our views better.

"Yours, truly,

(Sig.) "FOSTER & THOMSON."

That the proposed order of reference referred to in said letter and consented to by said proctors was as follows, after being entitled in the suit, and with the formal parts reads as follows, viz:

"It is hereby ordered that it be referred to Edward L. Owen, Esquire, a commissioner, to ascertain the amount of damages of the libellants herein, and to report thereon with all convenient speed. But all questions as to the jurisdiction of this court in the said libel, and all questions as to the limitation of amount of claimant's liability in any event, are hereby expressly reserved, and may be raised upon a motion to confirm the report of the commissioner, or at any previous time.

"We consent to the entry of the foregoing order.

(Sig.) "FOSTER & THOMSON,
"*Proctors for Claimants.*"

That deponent declined to enter this order, because it was not in accordance with the agreement had with deponent, and was entirely irregular, and because deponent thought that said proctors were precluded at that stage of the case, and after all that had transpired, from raising any such questions as were indicated in said order.

That this was the first time that the question of jurisdiction had ever been spoken of by the other side, and that deponent asked said Foster why this question had come up at this stage, and said Foster replied from seeing a decision by the English court in the case of the Franconia, reported in the papers a short time previously.

25 That no answer nor exceptions to the libel herein having been filed, and the time for so doing having a number of months expired, deponent thereupon, on the twenty-third day of November, 1876, prepared and served on said proctors a notice of motion before this court on November twenty-seventh, 1876, for an interlocutory decree herein, and on the return day of said motion de-

ponent found that an answer was filed in this court on November twenty-fifth, 1876.

And deponent further says that it has always been the plan and intention of all the proctors herein, as far as he is informed and believes, to submit the decision and settlement of this case to this court, and the question of jusidiction has never been objected to in any way until within the two or three weeks past, and after deponent had declined to accept the offer of five thousand dollars.

And deponent further says that the steamship Great Western, that did the damage in this case, and the steamship Cornwall, that was attached herein, were sister ships, forming a regular line between this port and Bristol, England, this port being one of the regular termini of the line, and having a regularly constituted agent here, and advertised in our papers as

"Great Western Steamship Line."
"New York to Bristol (England) direct.

* * * * * * *

"For freight or passage apply to

"W. D. MORGAN,
"*Agent, No.* 70 *South Street, New York.*"

That after this action was commenced deponent put himself to the trouble and expense of sending to the registrar general of England,
to ascertain the full names of the owners of said steamships,
26 and has received from him a certified copy of the particulars
of the registry, ownership, and interest of the said steamships, and it appears therefrom that Mark Whitwill, one of the respondents herein, who has appeared, Joseph Haynes Nash, and Philip John Worsley were the owners of the whole of the steamship Great Western, and that the same Mark Whitwill, Charles Thomas, and Charles Nash were the owners of the whole of the steamship Cornwall; and the captain of said steamship Great Western, in his deposition of April fifth, 1876, on file in this court, testified that the said Mark Whitwell was the managing owner.

And deponent further says, as appears from respondents' testimony herein, that after the said steamship Great Western had done the damage claimed herein, on the following evening she was run on shore on the south side of Long Island, near Fire Island light, and was abandoned as a total loss.

That the libellants' bark Daphne, although bound from Baltimore for Marseilles, France, after the collision in question, was obliged to run for the nearest port where she could be repaired, and so put into this port, where she arrived and discharged her cargo and had the repairs made, and reloaded her cargo and sailed hence for Marseilles.

That the said repairs and expenses amounted to upwards of sixteen thousand dollars, and all the witnesses who worked on said vessel and cargo, and who know the extent of damages done, some ten or more in number, are residents here in the vicinity and within the jurisdiction of this court.

And deponent further says that it will be a serious and severe

hardship to these libellants if this court should refuse to entertain jurisdiction of this case at this stage of it, and would be a denial of justice after so long a time has elapsed and after the testimony of the witnesses has been taken and filed in this court, and through the misleading by the action of the respondents', libellants', witnesses have been allowed to be and have become scattered, so as to
27 render it an impossibility to find them again.

That, as this deponent has been informed and believes, the steamship Great Western at the time of the loss in question was insured against the risk of collision, and that although in form the owners are contesting this suit, in reality the underwriters are the real defendants, endeavoring to effect a reduction by compromise or otherwise of the just amount due to these libellants, the only real question in difference being as to the amount of the damages, of which the proof is within the jurisdiction of this honorable court, as aforesaid.

HENRY T. WING.

Sworn to before me, this 13th day of December, 1876.

JNO. BASSET, JR.,
Notary Public, N. Y. City & Co.

Endorsed: Affidavit to oppose motion to dismiss libel for want of jurisdiction. Filed April 7th, 1877.

Opinion.

BENEDICT, J.:

This is an action *in personam* brought by Jens Thomessen and Julius Smith, owners of the bark Daphne, against Mark Whitwill and others, composing the firm of Mark Whitwill & Co., owners of the steamship Great Western, to recover for the injuries sustained by the bark Daphne in a collision with the steamship Great Western that occurred on the 24th of March, 1876, on the high seas.
28 Upon the filing of the libel process was issued with an attachment clause, by virtue of which property of the defendant Mark Whitwill was seized within this district, whereupon the defendant entered a general appearance in the cause and obtained the release of his property by giving a stipulation to abide the event. Thereafter the testimony of three witnesses was taken *de bene esse* on the part of the respondent, and the depositions filed in court. Afterwards the testimony of seven witnesses was taken *de bene esse* on the part of the libellants, and their depositions also filed in court on the 10th day of April, 1876. In November the defendant Whitwill filed his answer to the libel, wherein he joins issue upon the merits.

The respondent now makes known to the court that the libellants and the respondent are aliens who have never been domiciled in the United States, nor were they or either of them temporarily present in the United States at the commencement of the action or since; whereupon the respondent objects to the entertaining of this action by this court, and prays that the court would forbid the further prosecution thereof by reason of the facts made known as aforesaid.

In support of this application the ground has been taken that as a matter of law the court is without jurisdiction to entertain an action *in personam* where the parties are aliens, neither domiciled nor temporarily present in the United States.

This position has not been strongly insisted on, and cannot be maintained. The district courts of the United States have original jurisdiction of all civil cases of admiralty and maritime jurisdiction, and this jurisdiction depends upon the subject-matter. Whenever the matter is maritime in its nature any district court may entertain jurisdiction, provided it acquires jurisdiction of the parties in the manner prescribed by law. Here the matter is conceded to be maritime in nature, and jurisdiction over the person of
29 the defendant has been duly acquired. There is, therefore, no room to question the power of the court to determine the matter in controversy. The most that can be claimed is that the court has power to decline to proceed in the cause upon being informed that the controversy is one between aliens. A doubt has been suggested whether a court of admiralty can, in a case where jurisdiction of the person has been acquired rightfully, decline to entertain jurisdiction of a cause of collision on the high seas (*The Mali Ivo*, 3 Mar. Law Ca., p. 245), and if such doubt would arise in any case it arises in a case like this, where the parties are foreigners of different nationalities, and therefore cannot be remitted to any forum that will not be foreign to one of them.

In countries where the civil law forms the basis of their jurisprudence, and, in accordance with the maxim of the civil law, *actor sequitur forum rei*, personal actions must be brought before the tribunals of the place where the defendant has a domicile. Actions for collision have been made an exception, and may be brought where neither of the parties reside. The ground of the exception is the legal fiction that in case of a collision a *quasi*-contract arises on the part of the wrong-doer to pay the damage he has caused, and as it cannot be supposed to be intended that such a contract is to be performed upon the sea, the place of its performance must be taken to be the port at which the injured vessel first arrives. Wherefore the tribunals of the port at which the vessel first arrives take cognizance of the action as being to recover a demand there payable. This is the ground taken in local tribunals. But courts of admiralty are in a fair sense international courts. As originally constituted in Europe, they are the appropriate tribunals to take cognizance of suits where the parties are foreigners. And if resort to such a fiction, as above stated, be allowable anywhere to support jurisdiction, it may be allowed in courts of admiralty. If allowed, the jurisdiction follows, as of course. (The Jerusalem, 2 Gall., 195.)

30 The power of every government to prohibit its tribunals to be engaged in determining the rights of aliens of course exists; but when courts of admiralty, with general admiralty powers, have been constituted without any such prohibition, it is much to say that it is within the discretion of the judge of such a court to decline to hear a cause of collision arising on the high seas between vessels of different nationalities, and where consequently there is no

home forum to which the parties can be remitted. "Where the question is one of *jus gentium* to be determined by sound discretion acting upon general principles, the court will hold plea of it." (Brown, Civil and Ad. Law, vol. 2, p. 119.)

The remark, in the opinion of the Supreme Court of the United States in the case of the Maggie Hammil (9 Wal., p. 457), that "the question is one of discretion in every case," &c., is broad enough to cover cases of collision, but does not cover a case like this; and besides in that case the question was not raised by the pleadings, nor involved in the controversy there made. Reference has been made to numerous cases of foreign seamen, cases peculiarly maritime in character, where courts of admiralty have declined to entertain the action. But cases of this character bear a peculiar relation to commerce, and under some circumstances may cripple a maritime adventure. This relation has often given rise to the insertion in treaties of special provisions in regard to such actions. Such cases stand upon a somewhat different ground, therefore, from cases of collision, and I know not that I could agree with all that has been said with regard to entertaining jurisdiction even in wages cases.

Again, it is said that the law applicable in cases of foreigners is to be found in the implication arising from the remark of Story, that "suits are maintainable here between foreigners where either of them is within the territory of the State in which the suit is brought." (Conflict of Laws, § 542.) In this case the defendant is here
31 by his agents authorized to defend his interest, by his property which has been attached, and by his stipulation given upon which judgment is to be entered, if at all.

But assuming that the court may decline jurisdiction in such a case as this, it cannot be denied that a strong case must be shown to justify the exercise of that power. The present case is far from strong. It is true that the defendant is a foreigner without domicile here, but he is owner in a line of steamers that run regularly from New York, which line has a permanent office in the city of New York. His defence can be made here as well as anywhere, and his rights will here be adjudged according to the same rules administered by the courts of his own country. As between him and the libellants he is laid under no disadvantage, therefore, by being compelled here to answer this demand.

Moreover, the request to decline jurisdiction has been delayed until the testimony has been taken and filed, and the libellants' evidence made known. It is said that as the matter rests with the court, and the ground on which jurisdiction will be declined arises out of the duty of the court to give its time to citizens rather than to aliens, delay in making the application is of no moment. But when during the period of delay the position of the parties has changed in any material degree, and especially by action taken in court without objection, delay may afford a reason for declining the application. The fact that this is a cause of collision where the parties have gone to the expense of taking the testimony of some thirteen witnesses, whose depositions have been received on the files of the court, appears to me to give the libellants just ground to require of

this court to complete the proceeding that has been allowed to go on so far. Justice requires that the libellants be not compelled to take this testimony over again, and not put to the hazard of losing the evidence as it stands of record in the cause, and not com-
32 pelled to lose the benefit of the security which the respondent has given in this cause without the suggestion of an intention to ask the court to decline to enforce it.

Furthermore, it must be noticed, that this action is brought not only at the port where the disabled vessel first arrived after the accident, but where the damage to her was repaired, and the affidavits make it evident that the only real controversy between the parties is as to the amount of damage caused by the collision. The questions which the court will be called on to decide relate therefore to acts done and payments made in this port, and this is therefore the natural and proper place for an investigation of these questions.

It is for the interest of our nation that its ports be resorted to by foreigners for the purposes of repairing their ships. To say to foreigners so resorting to our ports that proof of the work there done cannot be made in our courts, as against aliens liable to pay for the same, would tend to deter parties from using our ports as a place of resort. As a matter of public policy, therefore, our courts should not decline to entertain such an action as the present. For these reasons the application is denied and the action must proceed.

C. VAN SANTVOORD AND
JAMES K. HILL,
For Libellants.

R. D. BENEDICT AND
FOSTER & THOMSON,
For Respondents.

33 At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court rooms, in the city of Brooklyn, on the 12th day of April, A. D. 1877.

Present: Hon. Charles L. Benedict, district judge.

JENS THOMMESSEN and JULIUS SMITH
against
MARK WHITWILL *et al.*

This cause coming on to be heard on a motion by the respondent, Mark Whitwill, on the pleadings and proceedings in this cause, and the affidavit of William D. Morgan, sworn to the sixth day of December, A. D. 1876, of which a copy was annexed to the notice of the motion served on libellants' proctor, sixth December, 1876, for an order that the court decline to entertain jurisdiction of the action, and that the libel be dismissed by reason of such refusal to entertain jurisdiction, or for such other or further order or relief as should be just, and on the affidavit of H. T. Wing, sworn to the thirteenth day of December, A. D. 1876, submitted on behalf of the libellants, after hearing counsel for the respective parties, and deliberation had, it is now

Ordered by the court, that the court may and ought to entertain jurisdiction of the action, and that the said respondent's motion be denied, and that the cause proceed.

CHAS. L. BENEDICT.

Endorsed: Order. Filed and entered the 12th day of April, 1877.

34 *Opinion.*

MARCH 25TH, 1878.

BENEDICT, J.:

This is an action *in personam* brought against the defendant as an owner of the steamship Great Western, by the owners of the bark Daphne, to recover for injuries done to the bark Daphne by a collision with the steamship Great Western that occurred on the 24th day of March, 1876. The evidence as to the circumstances under which the Great Western collided with the Daphne has left no room to contend that the accident arose from any other cause than the negligence of the Great Western, and accordingly no attempt has been made to dispute the liability of the defendant. The question made pertains to the extent of that liability. The facts out of which this question arises are as follows:

The collision which caused the damage sued for occurred on the high seas and outside of the territorial waters of any nation. Both vessels were foreign to the United States; the one being a Norwegian bark, the other a British steamer. None of the owners of either vessel are residents of the United States. The defendant is a British subject, and the libellants are subjects of Norway and Sweden. The steamer sustained no damage from the collision, and after the accident, proceeded on her voyage toward the port of New York, to which port she was bound, but before reaching her destination she stranded on Fire Island beach, and was afterwards sold as a wreck at public auction by direction of her owners. Various parties were purchasers at this sale, and a considerable part of the proceeds, some $1,200, is in the hands of the agents of the owners in New York. The total amount realized from this sale of the steamer is much less than the sum claimed for the damage caused to the Norwegian bark, but the value of the steamer prior to her stranding far exceeded that sum.

The defendant, who was brought into court by a foreign attachment to answer the demand of the owners of the Norwegian bark, in his answer offers to surrender the steamer to the libellants, and
35 upon the trial tendered a written surrender of the defendant's interest in the steamer and her freight as of the date of March 25, 1876.

Upon these facts it is contended in behalf of the defendant that he is exempt from liability to the libellant for the collision in question.

This contention presents at the outset a question as to the effect of the statutes of the United States, relating to the liability of shipowners (Rev. Stat., sec. 4282 to 4289), upon the rights of the parties before the court.

An examination of those provisions of the statute renders it quite plain that no effect can be given them in an action like the present

between foreigners arising out of an occurrence that took place beyond the territorial limits of the United States. The statute contains no language to indicate an intention to give it an extra-territorial effect, and every presumption is against such an intention. A court of admiralty, which is in a proper sense an international court, one of the functions of which, and not the least important, is to administer international justice in maritime suits between foreigners" (Dr. Phillimore), certainly, in the absence of express language to that effect, would not be justified in enforcing against foreigners the provisions of a municipal statute of this character in a case like this. Says Vice-Chancellor Wood, speaking of the law of England relating to the liability of ship-owners: "I should entertain great doubt, to say the least of it, as to whether or not a foreign ship, meeting on the ocean with a British ship, and being damaged by it, could be deprived of its rights by any act of Parliament." (General Iron Company *vs.* Schurmann, 1 M. L. C., p. 62.)

It has been suggested in regard to statutes of this description that effect may be given to them in all cases upon the ground that they relate to the remedy. But, manifestly, such is not their true nature. (The Amalia, Dr. Lushington, 1 M. L. C., p. 361.)

36 In determining the case of the Amalia just cited, the privy council, noting the case of Cope *vs.* Doherty, where the collision was on the high seas between two American vessels, one of which sought in an English court to take the benefit of the English statute, say: "It seems extraordinary that any question should ever have been raised upon a case of this description," and although they give the English owner the benefit of the English statute, limiting the ship-owner's liability in the case before them, where the collision there in question occurred upon the high seas between an English and a foreign vessel, it is upon the sole ground of the words of the English statute, as shown by Dr. Phillimore in the case of the Halley. (2 M. L. C., p. 562.)

The present case is different, because here both parties being foreigners, the ship-owner does not invoke the statute, but the libellant invokes the statute of the United States to determine the extent of the ship-owner's liability, and that statute contains no language that will admit of the supposition that it was intended to apply to foreigners out of the jurisdiction.

It being impossible, therefore, to find in our own statute law the rule by which to determine the extent of the defendant's liability, it may next be inquired whether resort can be had to the law of the nation to which the parties belong, and here the answer seems plain. The parties are the subjects of different nations, and no good reason can be given for resorting to the law of one of these nations rather than the other. The defendant, who is a British subject, has not brought himself within the control of the laws of Norway and Sweden, nor have the libellants the right to ask this court to apply in his behalf the law of Great Britain. The act out of which the defendant's allegation arose, not having been done either in Norway or England.

I am aware that it has been sometimes attempted in deter-

37 mining questions of this character to call in the aid of that fiction of law by which a ship, wherever she may be, is for certain purposes deemed to be a part of the land from which she hails. In this view it could be here contended on the one hand that the obligation of the defendant should be deemed to have been incurred in England, because the acts of negligence which render him liable were acts done in the navigation of a British ship; while, on the other hand, it could be urged that the blow which did the injury was delivered on the Norwegian vessel, and the obligation resulting from the blow must therefore be deemed to have been incurred in the kingdom of Norway and Sweden. Neither of these positions has been assumed by the advocates in this case, and it doubtless appeared to them, as it does to me, that it would be carrying the fiction too far to decide that the collision in question occurred in either of the countries mentioned.

It seems quite plain that the defendant, as he was not in fact on board the Norwegian vessel, was neither in fact nor in law within the jurisdiction of Norway and Sweden at the time of doing the acts complained of, and if the law of England could be applied upon the ground that the acts of negligence were done upon an English vessel it would be of no benefit to the defendant, as by that law the value of the vessel just before the collision is taken as the limit of the ship-owner's liability. (Reg. *vs.* Keyn, Eng. L. R., 21 Ex. Div., p. 63.)

The nature and extent of the defendant's obligation must indeed be determined according to the law of the place where he incurred the obligation, and that place was not in England nor in Norway, but on the high seas. The law of the seas—"the law maritime according to the law of nations" (Sir John Nichol, the Giovanni, 3 Hagg, 177), is therefore the law to be here administered.

There is a maritime law of the United States which consists of statutory provisions and such of the customs of the sea as the courts may see fit to adopt. (The Lottawanna, 21 Wal., p. 573.)

38 There is also a general maritime law in force upon the sea, which is part of the law of nations, and consists of certain rules applicable to affairs of the sea, which have been so often acted upon and by so many different nations that they are deemed to have been assented to by all, and according to which all persons going on the sea may justly be supposed to have agreed to be judged in respect to acts there done. This law, courts of admiralty by the comity of nations, are in a proper case authorized to administer. See the case of the Scotia (14 Wal., p. 187), where the international navigation rules were applied as having become part of the maritime law operative on the high seas, by reason of the assent of most maritime nations as expressed by the enactment of the rules.

The enquiry therefore arises whether there be any rule of the general maritime law by which the defendant's liability is limited; for if not, his liability upon principles of natural justice must be held to extend to the full measure of the damages occasioned by his wrongful act. As to the existence of a rule of the general maritime law upon the subject under consideration, there is no room for con-

troversy, it having been ascertained and declared by the Supreme Court of the United States in the following language: "By the maritime law the liability of the ship-owner was limited to his interest in the ship and freight for all torts of the master and seamen, whether by collision or anything else, and sometimes even for the master's contracts; and his liability was so strictly limited that he was discharged by giving up that interest, or by the vessel being lost on the voyage, and the maritime courts found no difficulty in carrying this law into execution." (Norwich Co. *vs.* Wright, 13 Wal., p. 119.)

The rule of the maritime law thus recognized by the Supreme Court of the United States, has also been recognized by the
39 legislation of many foreign countries, viz., Portugal, Holland, Hamburg, Denmark (Code of 1683), Sweden and Norway (Ordinance of 1667), Russia, the two Sicilies, Malta in the Lombardo Venetian Kingdom, Sardinia, the countries governed by the Ordinance of Bilboa, that is, Mexico and the republics of South America, and by Prussia. The rule can therefore well be applied here as an existing rule of the general maritime law upon the same ground that the international navigation rules were applied in the case of the Scotia above referred to "In matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed, as in justice it should be." (The Lottawanna, 21 Wall., p. 572.) To the same effect is the remark of Dr. Phillmore when, in deciding the case of the Halley, he says: "If, therefore, this collision had taken place upon the high seas, it must, upon general principles, have been adjudicated according to the *lex maris*."

The question presented in the case of the Halley related to the extent of the ship-owner's liability for the damages arising from a collision, and the opinion in that case contains observations which afford support to the position that upon this subject the rule is furnished by the Roman law, according to which the only limit of liability would be the extent of the damage. But the case then before the court was not one of a collision on the high seas, and the rule applicable to a collision of that description is plainly expressed in the language above quoted. As pointed out by Judge Ware in the case of the Rebecca (1 Ware, 195), by most, if not all, the nations of Europe an important qualification of the general rule of the Roman law was admitted in the case of the ship-owner, namely, that the extent of his liability was limited to the value of the ship and freight. It is only as thus qualified that the rule of the
40 Roman law can be said to be the rule of the maritime law. (Norwich Co. *vs.* Wright, 13 Wall., 119.)

The right to abandon the ship and freight, and thereby to be released from liability and the necessity of such an abandonment, in order to be entitled to the benefit of the exemption, obviously follow from the rule.

There remains, therefore, in this case, only the question whether the defendant has waived his right to claim exemption, and, if not, whether the surrender of his interest, as tendered in his answer and

upon the trial, was in such form and at such time as to effect his release from liability to the libellants. A citation or two from Caumont Diction-aire de droit Maritime will show authority which renders easy the decision of these questions. Says Caumont (Title Abandon, p. 87): "On principle, since the law fixes no limit of time for the surrender, it follows that the ship-owner, as long as he has not renounced his legal right, expressly or tacitly, can make this surrender at any time and at any state of the cause after the ship has foundered (Brussels, 31st July, 1858,) or been totally lost (Paris, May 24, 1862,) or seized (Marseilles, June 30, 1828,) or sold after a misfortune at sea (Bordeaux, Aug. 9, 1859)."

Again, in § 91, decided (1) * * * and (2) "That the law fixing no limit for the exercise of the right of surrender, it ought to be admitted as long as no fact has intervened from which one can infer that the owner has renounced the exercise of his right. Such a renunciation cannot be inferred from a defence on the merits if the surrender has been proposed by the same pleading as the defence on the merits." (Cass, 31 Dec., 1856.) The sale above alluded to must be a judicial or official and adverse sale, for the same author in § 93 says: "The surrender may be proposed after a judicial sale. In authorizing the owner to free himself by a surrender the Legis-
41 lature has wished to preserve the land fortune of the owner. This privilege is principally useful to him when events have made the expedition profitless. But the sale of the ship must be the consequence of fortune of the sea. If the sale was the consequence of the choice of the owner, the intention to renounce the right to surrender may be inferred." (Bordeaux, 9 Aug., 1859.)

These statements of the rule of the maritime law, as applied in the maritime courts of France, may with safety be taken to show the understanding of the rule by maritime nations, and they will, I think, be found to be supported by accredited writers whose works courts of this country have often considered to furnish sufficient evidence of the law.

According to the law, as above stated, it cannot be held that the defendant's tender of his interest in the vessel was defective in form, or, having been made in the answer, was too late in time, provided the right to abandon had not been lost and an abandonment was then possible.

"As to the form of surrender the law has made no provision. It may be made by declaration, before a notary, signified to the creditors, or by a simple notice sent by an officer (*exploit d'hussier*) or even on the plea made by the owner to defeat the action constituted against him." (Des Capitaines Maitres et Patrons, by Eloy & Guinand, p. 722.)

But there remains a fatal difficulty for the defendant, viz, that when he made his tender he had no interest in the vessel to abandon.

The undisputed evidence is that in April 1, 1876, after the filing of the libel in this cause, and before the filing of the answer, the vessel (there was no freight) was sold by the defendant, and then passed into the possession and ownership of other parties. The

vessel was not condemned and sold by process of law, nor was she abandoned to the underwriters and sold by them, but the sale was a voluntary act of the owners, and it transferred the ownership
42 as well as the possession of the property to third parties, and without notice to these libellants. Even the proceeds have been in part made use of. It was not possible, therefore, for the defendant to surrender the vessel when he attempted to do so, for he had then no interest in her capable of being surrendered. This sale of his vessel, under such circumstances, not only warrants but compels the inference that there was an intentional waiver of the right to claim exemption from personal liability beyond the ship and her freight, and renders it impossible for the defendant now to obtain the limitation of liability that he seeks.

As to the effect of a sale of the ship by the owner upon his right to exemption, see Bedarride, Condu Code de Commerce, Liber II; Droit Maritime, Tome I, §§ 290, 291,293.

There must therefore be a decree in favor of the libellants for the full amount of the damage by them sustained.

43 At a stated term of the district court of the United States of America, for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on the 28th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

The Honorable Charles L. Benedict, district judge.

JENS THOMMESSEN *et al. vs.* MARK WHITWILL *et al.*

This cause having been heard upon the pleadings and proofs, and submitted upon the arguments and briefs of the advocate for the respective parties, and due deliberation having been had thereon:

Now, on motion of James R. Hill, proctor for libellants, it is ordered, adjudged, and decreed, that the libellants herein recover from the respondent the damages by them sustained by reason of the matters alleged in the libel herein.

And on like motion it is further ordered that it be referred to B. Lincoln Benedict, one of the commissioners of this court, to ascertain the amount due the libellants, and report thereon to this court, with all convenient speed.

CHAS. L. BENEDICT.

Endorsed: Interlocutory decree and order of reference. Filed and entered the 28th day of March, 1878.

44 At a stated term of the United States district court for the eastern district of New York, held at the court-rooms thereof in the United States court building, in the city of Brooklyn, on the 21st day of February, in the year of our Lord one thousand eight hundred and eighty-one.

Present: Hon. Charles L. Benedict, district judge.

JENS THOMMESEN *et al. against* MARK WHITWILL *et al.*

This cause having been heard on the exceptions taken to the com-

missioner's report on the reference filed herein, and having been argued and submitted on briefs by the advocates for the respective parties, and due deliberation being had thereon,—

It is now ordered and adjudged by the court that the fifth exception of the respondent as to the allowance of the sum of four hundred dollars for custody of cargo be, and the same is hereby, allowed.

It is further ordered and adjudged that all the other exceptions of the respondents and libellants be, and the same are hereby, disallowed.

It is further ordered, adjudged, and decreed that the said report be, and the same is hereby, in all other things confirmed.

It is further ordered, adjudged, and decreed that the libellants, Jens Thommesen and Julius Smith, do recover herein against the respondent, Mark Whitwill, the sum of seventeen thousand
45 twenty-three dollars and forty-four cents ($17,023.44), with interest on fourteen thousand three hundred and seventy-four dollars and forty-four cents ($14,371.44) from May 6th, 1876, to date of this decree, amounting to four thousand one hundred and thirty-one dollars and seventy-nine cents ($4,131.79), and seven hundred and sixty-two $\frac{62}{100}$ dollars costs as taxed, making together the sum of twenty-one thousand nine hundred and seventeen $\frac{85}{100}$ dollars, and that judgment be, and the same is hereby, entered therefor in favor of said libellants and against said respondent.

And it is further ordered that the stipulators for costs and value on the part of the respondent cause their stipulations given on the appearance of the respondent and the discharge of the property attached, from custody, to be performed, and that in default thereof, and unless an appeal be taken from this decree within the time limited by the rules of this court, the libellants have execution to enforce satisfaction of this decree.

CHAS. L. BENEDICT.

Endorsed: Final decree. Filed and entered on the 21st day of February, 1881.

46 District Court of the United States for the Eastern District of New York.

JENS THOMMASSEN and JULIUS SMITH *vs.* MARK WHITWILL *et al.*

GENTLEMEN: Please take notice that Mark Whitwill, respondent in the above-entitled cause, hereby appeals to the next circuit court of the United States, to be held within and for the eastern district of New York, in the second circuit, from the final decree of this court, dated and entered herein on the 21st day of February, 1881, adjudging and decreeing that the fifth exception of the respondents to the report of the commissioners herein be allowed; that said report be in all other things confirmed, and that the libellants, Jens Thommassen and Julius Smith, recover of the respondent, Mark Whitwill, the sum of twenty-one thousand nine hundred and seventeen $\frac{85}{100}$ dollars, and from each and every of the several orders

made herein in regard to the jurisdiction of this court, and otherwise against said respondent.

Dated New York, Februray 23, 1881.

Yours, &c., FOSTER & THOMPSON,
Proctors for Respondent.

To B. Lincoln Benedict, Esq., clerk. Jas. K. Hill, Wing & Shoudy, Esqs., proctors for libellants.

47 Due service of a copy of the within notice of appeal is admitted, this 25th day of February, 1881.

JAS. K. HILL,
WING & SHOUDY,
Proctors for Libellants.

Endorsed: Notice of appeal. Filed February 25th, 1881.

Circuit Court of the United States for the Eastern District of New York, in the Second Circuit.

JENS THOMMESEN and JULIUS SMITH
against
MARK WHITWILL and JOHN DOE.

To the honorable the circuit court of the United States for the eastern district of New York, in the second circuit:

The petition of appeal of Mark Whitwill, the respondent in the above-entitled action, respectfully showeth:

That on or about the 27th day of March, 1876, Jens Thommessen and Julius Smith, of Norway, the above-named libellants, on behalf of themselves and of the owners of the cargo laden on board the
48 Norwegian bark named Daphne, filed their libel in the district court of the United States for the eastern district of New York against this appellant, Mark Whitwill and John Doe, in a cause of collision, civil and maritime, in which it is alleged that the Norwegian bark Daphne, owned by said libellants, and the cargo laden thereon, was, on the night of March 24, 1876, about one hundred and sixty miles east southeast from Sandy Hook, injured to the amount of twenty thousand dollars by a collision with the British steamer "Great Western," owned by this appellant and John Doe; that said collision and resulting damage was caused solely by the negligence and improper conduct of those on board said steamer, and praying, among other things as therein contained, that process might be issued against the respondents therein named, and that they might be compelled to appear and answer the allegations of the libel, and in case they could not be found, that their goods and chattels and property to the amount sued for should be attached, and that the respondents be compelled to pay the libellants' claim, with costs, to which said libel these appellants pray leave to refer for its contents.

That the marshal to whom the process prayed for was delivered having returned thereon that he had not found the said respondents,

but had attached, or claimed to have attached, the steamer "Cornwall," the property of this appellant, this appellant filed his claim in this court, claiming the said steamer "Cornwall" as owner thereof, and appeared in this action by his proctors; that no property of the respondent, John Doe, was ever attached, nor did said respondent ever appear herein.

That afterwards, and on or about the 25th day of November, 1876, this appellant filed his answer herein, alleging, among other things as therein contained, and insisting that the said collision did not occur through the negligence of those on board said steamer
49 "Great Western," but occurred solely through the carelessness and negligence of those on board said bark "Daphne;" that if the libellants' claim should be established against this appellant in said action, the liability of this appellant would be limited to the amount or value of his interest in the said steamer "Great Western" and her freight money, which said interest was of no value whatever, and praying that the said district court would be pleased to pronounce accordingly, and to dismiss this appellant with his costs, as will more fully appear by reference to said answer, and to which for its contents this appellant prays leave to refer.

That afterwards, and on or about the 7th day of February, 1877, a motion was made and heard on behalf of this appellant before the Honorable Charles L. Benedict, judge of said district court, to dismiss said libel, in which, among other things, it was insisted by this appellant that the said district court had not jurisdiction to hear and decide the claim of said libellants, and had not jurisdiction to issue the process as in this cause had been issued, and had not jurisdiction of the cause of action alleged in the libel; and, furthermore, that if the said court had jurisdiction to entertain the action the same ought not to be entertained, inasmuch as none of the parties to this action were citizens of or residents in the United States of America, but all of them were non-resident aliens; and the said judge, having advised thereon, did, on or about the 7th day of April, 1877, make an order bearing date and entered the 12th day of said April, wherein and whereby, among other things, he adjudged that said district court had jurisdiction to issue such attachment and to hear and determine said claim of said libellants, and had jurisdiction of the cause of action alleged in said libel, and that he would not refuse to entertain jurisdiction thereof, as by the said order and the proceedings on
50 the said motion will on reference thereto more fully appear, and to which for the contents thereof this appellant beg leaves to refer.

That afterwards, and on or about the 16th day of April, 1877, the said cause came on to be tried and heard before the Honorable Charles L. Benedict, judge of the said district court, upon the allegations and proofs adduced by the respective parties upon the issues raised by this appellant in his said answer.

That during such trial a motion was made and heard on the part of this appellant for leave to amend the answer of this appellant by inserting at the end of the seventh article thereof the words "and he hereby surrenders the same to the libellant;" that the said judge,

having advised thereon, granted such motion subject to objection; and the said judge, having advised upon the said allegations and proofs adduced by the respective parties upon the issues raised by this appellant in his said answer as amended, did, on or about the 28th day of March, 1878, make an interlocutory decree, bearing date the 28th day of March, 1878, that the said libellants recover of this appellant their damages sustained by said collision, and referring it to a commissioner of this court to ascertain the amount of such damages, as by reference to said interlocutory decree will more fully appear, and to which for the contents thereof this appellant prays leave to refer.

That afterwards, and on or about the 1st day of April, 1878, a motion was made and heard on the part of this appellant before the Honorable Charles L. Benedict, judge of the said district court, that the decree be opened and an amended answer filed, and the said judge, having advised thereon, did, on or about the 15th day of April, 1878, make an order whereby, among other things, he denied said motion, as by the said order and the proceedings on said motion will, on reference thereto, more fully appear, and to which for the contents thereof this appellant begs leave to refer.

51 That afterwards, and on or about the 1st day of June, 1878, a motion was made and argued on the part of this appellant before the Honorable Charles L. Benedict, judge of the said district court, that the said interlocutory decree herein be opened; and the said judge, having advised thereon, did, on or about the 14th day of June, 1878, make an order bearing that date, wherein and whereby he denied said motion, as by said order and the proceedings on said motion will, on reference thereto, more fully appear, and to which for the contents this appellant begs leave to refer.

That afterwards, and on or about the 29th day of April, 1878, and thereafter, as such hearing was from time to time adjourned, the said reference to ascertain the damages of said libellants came on and was heard before B. Lincoln Benedict, Esq., the commissioner appointed for that purpose, who, having advised thereon, did, on or about the 5th day of January, 1881, make and file his report, in and by which he found the damages suffered by said libellants, by reason of said collision, to be the sum of twenty-one thousand five hundred and fifty-seven $\frac{60}{100}$ dollars, as by the said report and the proceedings before said commissioner will more fully appear, and to which for the contents thereof this appellant prays leave to refer.

That afterwards, and on or about the 18th day of January, 1881, the exceptions to the report of said commissioner on the part of this appellant having been duly filed, came on to be heard before the Honorable Charles L. Benedict, the judge of said district court, and the said judge, having advised thereon, did, on or about the 21st day of February, 1881, make a final decree, bearing date on that day, in and by which it was adjudged that the fifth exception of this appellant to the report of said commissioner be allowed; that said report be in all other things confirmed; that the libellants recover of this appellant the sum of twenty-one thousand nine hundred and seventeen $\frac{85}{100}$ dollars, and that judgment in favor of said libellants

52 against this appellant be entered therefor, as by reference to the said exceptions and decree will more fully appear, and to which for the contents thereof this appellant prays leave to refer.

And this appellant is advised and insists that each and every of the orders and decrees of the said district court made in this cause against him is erroneous and ought to be reversed, and that the said district court ought not to have entertained jurisdiction of the said action and ought not to have decreed against this appellant, as the said court has done.

And this appellant, for these and for other reasons, appeals from the whole of said final decree, and from each and every of the several orders made herein in regard to the jurisdiction of the said district court of the United States for the eastern district of New York and otherwise against him, to the next circuit court to be held in the said district, and on the said appeal this appellant intends to put in new pleadings and to seek a new decision on the facts on the proceedings and proofs in the said district court and other proofs to be adduced in the said circuit court, and to pray additional and different relief.

And this appellant prays that the said final decree and every part thereof, and each and every of the several orders made herein in regard to the jurisdiction of said district court and otherwise, as against this appellant, may be reversed with costs, and that such other decree be thereupon made as the said circuit court shall deem just, and the said appellees be condemned to pay to this appellant his costs and damages in the premises.

And this appellant will ever pray.

Dated New York, March 7th, 1881.

FOSTER & THOMSON,
Proctors for Appellant.

Endorsed: Petition of appeal. Filed March 7, 1881.

52*a* District Court of the United States, Eastern District of New York.

JENS THOMMASSEN and JULIUS SMITH
vs.
MARK WHITWILL and JOHN DOE.

Whereas a decree has been duly entered in this court in this action, bearing date the 21st day of February, 1881, in favor of the above-named libellants and against the respondent, Mark Whitwill, for the sum of $21,917.85;

And whereas the said Mark Whitwill has duly prosecuted an appeal from said decree to the circuit court of the United States for the eastern district of New York, and is desirous that all proceedings under said decree shall be stayed pending the hearing and decision of said appeal:

It is hereby stipulated and agreed that a deposit may be made with the Bank of New York National Banking Association to the credit of this action of the sum of thirty thousand dollars, to secure

the payment of said decree and the costs on appeal therefrom, for which the said bank shall issue its certificate in triplicate, and that such deposit shall be instead of a bond for damages and costs on appeal as required by the rules of this court and of said circuit court. Such deposit so to be made shall be without prejudice to the stipulation given by the respondents' proctors on March 29th, 1876, and the bond referred to therein.

It is further stipulated that should the said decree of said district court be affirmed by said circuit court on said appeal, that the said Bank of New York National Banking Association shall pay
52*b* all damages and costs which shall be awarded against said appellant by said circuit court twenty days after notice of the entry of the judgment of said circuit court shall be served upon said appellants' proctors, unless said appellant, Mark Whitwill, shall within twenty days perfect an appeal from said decree of said circuit court to the Supreme Court of the United States, and cause within said time the proceedings upon said judgment or decree to be stayed, which said stay may, at the option of the said Mark Whitwill, be procured either by the continuance of deposit under the terms of this stipulation or by giving a bond on appeal in accordance with the rules and practice of the said circuit court. Should said Whitwill elect to stay said proceedings by giving a bond as aforesaid, then the said Bank of New York National Banking Association shall, upon the order of the said circuit court, made upon notice of four days to the libellants' proctor, and after a good and sufficient bond shall have been duly executed, approved and filed, be forthwith relieved from all liability under or upon the certificates of deposit given hereunder; but should said Whitwill elect to stay proceedings under said decree by a continuance of deposit made under this stipulation, and should such decree of said circuit court be affirmed by said Supreme Court, then the said Bank of New York National Banking Association shall pay all damages and costs which may be awarded against said appellant after the expiration of ten days from the filing in the said circuit court of the mandate of said Supreme Court affirming the decree of said circuit court.

And it is further stipulated that an order of court shall be entered on this stipulation, and that a written notice of the deposit provided for herein, with a certified copy of the order of the court herein, and a duplicate certificate of deposit from said Bank of New
52*c* York National Banking Association shall be served upon Jas. K. Hill, proctor for the libellants herein, on or before March 30th, 1881.

Dated March 25th, 1881.

JAS. K. HILL,
Proctor for Libellants.
FOSTER & THOMSON,
Proctor for Appellant.

U. S. Circuit Court, Eastern District of New York, Second Circuit.

JENS THOMMASSEN and JULIUS SMITH
against
MARK WHITWILL, impleaded with JOHN DOE.

This is to certify that the Bank of New York National Banking Association now holds the sum of thirty thousand dollars, in pursuance of a stipulation between the parties herein, bearing date March 25th, 1881, to be held subject to the further order of the court in the above-entitled action. This receipt issued in triplicate.

$30,000.

[L. S.] R. B. FERRIS, *Cashier.*

Endorsed: Stipulation and certificate of deposit. Filed March 30th, 1881.

52*d* At a stated term of the district court of the United States for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on Monday, the twenty-eighth day of March, in the year one thousand eight hundred and eighty-one.

Present: Hon. Charles L. Benedict, district judge.

JENS THOMMASSEN and JULIUS SMITH
against
MARK WHITWILL, impleaded with JOHN DOE.

On reading and filing the stipulation hereto annexed, signed by the proctors for the respective parties appearing herein, and the annexed certificate of the Bank of New York National Banking Association, and

On motion of Foster & Thomson, proctors for the appellant, Mark Whitwill,

It is ordered that all proceedings herein upon the decree in this action appealed from be, and the same hereby are, stayed, pending the hearing and decision of the appeal taken by the said Mark Whitwill from the said decree.

It is further ordered that the deposit made by said appellant, Mark Whitwill, with the Bank of New York National Banking Association, to the credit of this action, of the sum of thirty thousand dollars, to secure the payment of the said decree and the costs of appeal therefrom, for which the said bank has issued its certificate in triplicate, shall be instead of the bond for damages and
52*e* costs on appeal as required by the rules of this court and of the circuit court, and that such deposit so made shall be without prejudice to the stipulation given by the said respondents' proctors on March 29, 1876, and the bond referred to therein.

It is further ordered that if the said decree of said district court be affirmed by said circuit court on said appeal the said Bank of New York National Banking Association shall pay all damages and costs not exceeding the amount specified in said certificates of deposit which shall be awarded against said appellant by said circuit

court twenty days after notice of the entry of the judgment of said circuit court shall be served upon said appellant's proctors, unless said appellant, Mark Whitwill, shall, within twenty days, perfect an appeal from said decree of said circuit court to the Supreme Court of the United States, and cause within said time the proceedings upon said judgment or decree to be stayed.

It is further ordered that the said stay may, at the option of the said Mark Whitwill, be procured either by the continuance of the deposit under the terms of the stipulation hereto annexed or by giving a bond on appeal in accordance with the rules and practice of said circuit court.

It is further ordered that should said Whitwill elect to stay said proceedings by giving a bond as aforesaid, then said Bank of New York National Banking Association shall, upon the order of the said circuit court, made upon notice of four days to the libellants' proctor, and after good and sufficient bond shall have been duly executed, approved, and filed, be forthwith relieved from liability under or upon the certificates of deposit issued by it under the terms of the annexed stipulation.

And it is further ordered that should said Mark Whitwill elect to stay proceedings under said decree by a continuance of deposit made under the annexed stipulation, and should such decree
52*f* of said circuit court be affirmed by said Supreme Court, then the said Bank of New York National Banking Association shall pay all damages which may be awarded against said appellant not exceeding the amount specified in said certificates of deposit after the expiration of ten days from the filing in the said circuit court of the mandate of said Supreme Court affirming the decree of said circuit court.

It is further ordered that the said Mark Whitwill may prosecute his said appeal to said circuit court without giving any security for damages or costs on said appeal other than as provided for in the annexed stipulation and certificate of deposit.

By the court. B. LINCOLN BENEDICT, *Clerk.*

We hereby consent to the entry of the foregoing order.
Dated March 28, 1881. JAS. K. HILL,
Proctor for Libellants.
FOSTER & THOMSON,
Proctors for Appellant.

Upon above consent let above order be entered.
March 30, 1881. C. L. B.

Endorsed: Order. Filed March 30, 1881.

53 At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 25th day of May, A. D. 1882.

Present: Hon. Sam'l Blatchford, Asso. Justice of the Supreme Court of the United States.

JENS THOMMESSEN and JULIUS SMITH, Libellants and Appellees,
vs.
MARK WHITWILL, impleaded with JOHN DOE, Respondents and Appellants.

Cause called. Hearing ordered.
Jas. K. Hill, Wing & Shondy, proctors for libellants and appellees.
Cornelius Van Santvoord and Harrington Putnam, of counsel for libellants and appellees.
Foster & Thomson, proctors for respondent and appellant.
R. D. Benedict, of counsel for respondent and appellant.
Cause argued and submitted.
Decision reserved.

54 JULY 25, 1882.

Findings of fact and conclusions of law (on pages 80 to 89) filed by Hon. Samuel Blatchford, Associate Justice, before whom the cause was tried.

JULY 25, 1882.

Opinion (on pages 90 to 131) filed by Hon. Samuel Blatchford, Associate Justice, before whom the cause was tried.

MAY 12, 1883.

Libellants and appellees filed exceptions to rulings and decision of circuit judge (see pages 131 to 142).

JUNE 25, 1883.

Bill of exceptions settled (found on pages 61 to 189).

55 At a stated term of the circuit court of the United States for the eastern district of New York, in the second circuit, held at the United States court-rooms, in the city of Brooklyn, on the third day of August, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Hon. Samuel Blatchford, — Justice of the Supreme Court of the United States.

JENS THOMMESEN and JULIUS SMITH, Libellants and Appellees,
vs.
MARK WHITWILL, impleaded with JOHN DOE, Respondent and Appellant.

56 Mark Whitwill, the respondent in the above-entitled cause, having taken an appeal from the decree of the district court of the United States for the eastern district of New York, made and entered in this cause on the 21st day of February, 1881, ordering, adjudging, and decreeing that the libellants recover of the said respondent, Mark Whitwill, the sum of $21,917.85 damages and costs, and from each and every of the several orders theretofore made in regard to the jurisdiction of said district court or otherwise against the said respondent, and said appeal having come on to be heard upon the pleadings and proofs in the said district court, and

upon the pleadings as amended and the further proofs taken on behalf of said respondent in this court, and said appeal having been argued by the advocates of the respective parties and due deliberation having been had in the premises:

57

It is now considered ordered, adjudged, and decreed that the liability of said respondent, Mark Whitwill, to the libellants in this cause is limited to the value of the interest of said respondent, Mark Whitwill, in the steamship Great Western in the condition in which said steamship Great Western and the remnants of her were after the stranding and wreck of said steamship, on March 25th, 1876.

It is further ordered, adjudged, and decreed that the libellants, Jens Thommesen and Julius Smith, recover of the said respondent, Mark Whitwill, the sum of one thousand seven hundred and ninety-six dollars and fourteen cents ($1,796.14), being the value of the interest of said respondent in the said steamship Great Western in the condition in which she and the remnants of her were after her stranding and wreck on March 25th, 1876, with interest thereon from March 25th, 1876, to the date hereof, amounting to seven hundred and seventy-six $\frac{83}{100}$ dollars, and the further sum of seven hundred and sixty-two dollars and sixty-two cents ($762.62), the costs of said libellants in said district court as taxed, making in all the sum of three thousand three hundred and thirty-five dollars and fifty-nine cents ($3,335.59).

58

It is further ordered, adjudged, and decreed that the said decree of said district court appealed from, so far as the said decree awards to the libellants against said respondent any sum in excess of said sum of three thousand three hundred and thirty-five dollars and fifty-nine cents, be, and the same hereby is, in all things reversed and set aside.

59

It is further ordered, adjudged, and decreed that the said respondent, Mark Whitwill, recover of Jens Thommesen and Julius Smith, the libellants, the sum of one thousand one hundred and ninety-three $\frac{85}{100}$ dollars ($1,193.85), the costs of said respondent in this court upon said appeal as taxed.

And it is further ordered, adjudged, and decreed that unless an appeal be taken by the libellants from so much of this decree as is adverse to them, or by the said respondent from so much of this decree as is adverse to him, within the time limited by law and the rules and practice of this court, so as to operate as a supersedeas, the respective stipulators for costs and value cause their stipulations to be performed, or show cause why execution should not be issued against them to enforce satisfaction of this decree, so far as adverse to the party for whose benefit they became stipulators.

60

And it is further ordered, adjudged, and decreed that unless an appeal be taken as aforesaid by said respondent, Mark Whitwill, from so much of said decree as is adverse to him within the time limited by law and the rules and practice of this court, so as to operate as a supersedeas, the said sum of one thousand one hundred and ninety-three $\frac{85}{100}$ dollars ($1,193.85), awarded by this decree to said respondent, be set off against and applied in reduction of said

sum of three thousand three hundred and thirty-five $\frac{59}{100}$ dollars by this decree awarded to said libellant against him.

SAM'L. BLATCHFORD.

Endorsed: Decree. Filed and entered the 3d day of August, 1883.

61 *Bill of Exceptions.*

United States Circuit Court for the Eastern District of New York.

JENS THOMMESSEN and JULIUS SMITH, Libellants and Appellees,

vs.

MARK WHITWILL, impleaded with JOHN DOE, composing the firm of Mark Whitwill & Co., of Bristol, England, owners of the Steamship "Great Western," Respondent and Appellant.

This cause came on to trial at the city of Brooklyn, before the Hónorable Samuel Blatchford, Associate Justice of the Supreme Court of the United States, presiding at a term of the circuit court of the United States in and for the eastern district of New York, in the second circuit, on the 25th of May, 1882, on the appeal
62 by the respondent, Mark Whitwill, from the final decree of the district court of the United States for the eastern district of New York, in said cause entered on the 21st day of February, 1881, and from each and every of the several orders theretofore made in said cause in regard to the jurisdiction of the said district court or otherwise against him.

The counsel for the libellants read the libel of said libellants, as contained in the apostles transmitted from the district court.

The counsel for the respondent, Mark Whitwill, read his answer filed in the district court Nov. 25, 1876, as said answer is contained in the apostles in the said cause transmitted from the said district court to the said circuit court.

And upon said counsel proposing to read on the trial in the circuit court the amendment to the answer allowed against the
63 objection of libellants' counsel by the district judge, on the trial in the district court, on motion of respondent's counsel, April 19, 1877, by adding, at the close of the seventh article, the words "and he hereby surrenders the same to the libellants," the libellants' counsel again objected that the same was unauthorized, inadmissible, and irrelevant for the purpose proposed of limiting the liability of the respondent, and also for that, if otherwise admissible, it was not seasonably made.

The objections were overruled by the judge, and the answer was ordered to be so amended; and the libellants excepted to this his ruling and order.

The respondent, Mark Whitwell, on the trial in the district court, April 19, 1877, as set forth in the apostles, tendered to the libellants in open court a paper executed by said respondent, Mark Whitwill, by his duly authorized agent, and the execution of which was duly ratified by said respondent, Whitwill, of which the following
64 is a copy, and asked the court to note that fact, and put said

paper in evidence, subject to objection then taken by libellants' counsel:

Know all men by these presents that I, Mark Whitwill, of Bristol, England, heretofore part owner of the steamship "Great Western," do hereby surrender to Jens Thommessen and Julius Smith, of Arendal, Norway, owners of the bark Daphne, all my interest in the said steamship "Great Western" and her freight, as of the date of March 25th, 1876.

In witness whereof, I have hereto set my hand this 19th day of April, 1877.

MARK WHITWILL,
By W. S. MORGAN, *Agent.*

In presence of—
CHAS. F. WELLS.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 19th day of April, 1877, before me personally came William D. Morgan, to me known, and known to me to be the same per-
65 son described in and who executed the foregoing instrument as the agent of Mark Whitwill, therein named, and to me known to be such agent, and he to me acknowledged that he executed such instrument as and for the act and deed of the said Mark Whitwill.

CHAS. F. WELLS,
Notary Public, New York.

The respondent's counsel offering to read this evidence on the trial in the circuit court, and again tendering the said paper in open court to the libellants, the counsel for the libellants objected thereto, as inadmissable, insufficient, and irrelevant for any purpose of limiting the liability of respondent, and also for that, if relevant for any such purpose, the same was not reasonably made.

The judge overruled the objections and allowed the same to be read in evidence, and the counsel for libellants excepted to his so ruling.

66 The counsel for the libellants submitted and insisted on the trial that the allegation in the answer of the respondent filed 1876, Nov. 25, in the seventh article thereof, as follows—"That if the matters alleged in the libel be true, and the libellants' claim for damages resulting to said bark or her cargo, or both, from the alleged collission, shall be established herein against the respondent, the liability of the respondent therefore is limited to the amount or value of his interest in the said steamer Great Western and her freight upon the voyage during which said collision occurred, and that this respondent's said interest in said steamer and freight is of no value whatever," with the amendment allowed in the district court on the trial (April 19, 1877) by the addition of the words "and he hereby surrenders the same," and the offer to the libellants on the trial in the district court (April 19, 1877) of a formal surrender of the interest of Mark Whitwill as part owner, by an instru-
67 ment executed by William D. Morgan, of which a copy is

above set forth and tendered to the libellants in open court—furnished no ground for, and are insufficient as a ground for, an adjudication of a limited liability as claimed under the general maritime law; or, if it did, it did not do so either under the act of Congress limiting the liability of ship-owners or under any general maritime law which has been adopted by statute or usage in the United States, or to let in such claim.

The judge overruled the objection to this insufficiency and let in the claim, and the counsel for the libellants excepted.

Counsel for libellants then read the direct examination of Andreas T. Nielson, Ole Mostod, John Hansen, David Watson, Kund Aufinsen, Johan Johansen, Johan Peter Olassen, Dennis McCarthy, John A. Driscoll, John Olsen, J. C. Erhard, Tobias R. Wischer,
68 William Storke, Herman Niemeyer, Michael Holm, James S. Burke, P. D. Van Hoesen, David Clark, Robert Sullivan, William B. Dunley, Francis H. Jones, Hans Osmundson, Frederic T. Hewitt, Fergus S. Hayes, John Normann, George B. Gibbs, William Anderson, John P. Wessels, Edward C. Bowen, Joseph J. Hughes, Lewis Luckenbach, James O. Sherman, James F. Whitney, Edward Hincken, William H. Smith, Andrew McGuire, John B. Tobias, and Samuel H. Dolland, [and] the exhibits therein referred to, and counsel for said respondent, Mark Whitwill, read the cross-examination of said witnesses and the exhibits referred to therein, as the same were given in and presented to said district court, and as found in the apostles transmitted from the said district court to the circuit court; and thereupon libellants' rested.

Counsel for said respondent, Mark Whitwill, read the direct examination of Daniel H. Burdett, William D. Morgan, Samuel Windham, George Fox, George Hill, Samuel Harding, John C.
69 Valentine, and Francis A. Martin, and the exhibits therein referred to, and counsel for the libellants read the *the* cross-examination of said witnesses, and the exhibits referred to therein, as the same were given in and presented to the said district court, and as found in the apostles transmitted from the said district court to the said circuit court.

Counsel for said respondent, Mark Whitwill, then read the direct examination of John Jupe, taken on the part of the said respondent in the said circuit court, with the exhibits referred to in said direct examination, from which it appeared that before and at the time of the stranding of the said steamship Great Western said steamship was under insurance, effected by the owners thereof, to the amount of £34,000; that the owners of said steamship, on the 28th and 29th of March, 1876, duly made an abandonment of the said steam-
70 ship to the various underwriters who had insured her, and that the owners of said steamship realized the full amount of said insurance from the insurers of said steamship by the payment by said underwriters to said owners of said sum of £34,000 as for a total loss after tender of an abandonment.

Counsel for the libellants then read the cross-examination of said John Jupe, and the exhibits referred to therein, including copies of

the said several policies of insurance upon said steamship, which are contained in the exhibit hereto annexed marked "A."

Counsel of said respondent Whitwill read the direct examination of William D. Morgan, taken on the part of the said respondent, in the said circuit court, with the exhibits referred to therein, and counsel for the libellants read the cross-examination of said William D. Morgan and the exhibits referred to therein, from all which it appeared that the sale of the wreck of said steamship Great
71 Western, and of the materials saved therefrom, was for the account of the said underwriters thereon, and was made pursuant to directions from the owners thereof, and that after paying the expenses of saving and selling the property, it realized the sum of $1,796.14; that no freight had been paid to the owners of said steamship Great Western, on said voyage on which said steamship was lost, and that said William D. Morgan was the duly authorized agent of said respondent, Mark Whitwill, to execute in his behalf the said paper or surrender hereinabove set forth, and to take all further steps, if any necessary or proper, to carry out such surrender and make the same effectual, and that said Whitwill had fully ratified the execution by said said Morgan of said paper or surrender.

Counsel for the respondent, Mark Whitwill, offered to produce a paper, to be signed by said Whitwill, by said William D. Morgan, as his attorney, in all respects like the one above set forth
72 dated April 19, 1877, except containing a transfer to a trustee for the benefit of the libellants, under the provisions of section 4285 of the Revised Statutes of the United States, if the court should be of opinion that such transfer to a trustee, and not a surrender to the libellants, is necessary, and asked that in such event the answer be amended accordingly; this to be in addition to what appears in the record already. If the court shall so decide, the libellants to have an exception.

The testimony being closed, the counsel for the libellants thereupon proposed, on their behalf, the following statement of facts and conclusions of law to be found by the court.

73 *Findings of Fact and Conclusions of Law Proposed by the Libellants.*

U. S. Circuit Court, Eastern District of New York.

JENS THOMMESEN and JULIUS SMITH, Libellants and Appellees,

v.

MARK WHITWILL, Impleaded with JOHN DOE, composing the Firm of Mark Whitwill & Co., of Bristol, England, owners of the Steamship Great Western, Respondent and Appellant.

Findings of Fact.

I. The circumstances of the collision in the pleadings mentioned:

The bark Daphne, of Arendal, Norway, where she was built, of 510 tons burthen, owned by Jens Thommesen and Julius
74 Smith, of Arendal, Norway, a staunch and strong vessel, and as

certified by the French Veritas and in the Norwegian Veritas, insurance companies, a first-class vessel, Captain Andreas T. Nielson, of the age of 40 years, and an experienced mariner, who had followed the sea about 26 years, left Baltimore, Maryland, in good condition on the 18th of March, 1876, with a cargo of crude oil (petroleum) in barrels, bound from Baltimore to Marseilles, France, and passed between the capes out to sea on the 20th March. On the 21st March she encountered head winds and heavy weather.

Thereafter, on Friday night, the 24th March, after midnight, from twenty to thirty minutes past 12 p. m., the Daphne was run into by the British steamship Great Western, 978 tons register, her engines 180 horse-power, somewhere about that, her length about 175 feet, breadth of beam about 32 feet, bound from Gibraltar to New York, with a cargo of fruit and other merchandise, of which the respondent, Mark Whitwell and others, of Bristol, England, were the owners, the said Mark Whitwell being the managing owner.

The place of the collision was on the high seas, in latitude 39° 18′, and longitude 70° 9′ west of Greenwich, distant as estimated 175 to 180 miles from Sandy Hook.

Referring to the chart of the U. S. Coast Survey for bearing of the place of collision to Fire Island light-house, on the beach of that name, it will be seen that the light-house bears to the westward of N. W. by W. of a point or place 39° 18′ north latitude, and 70° 9′ west longitude, and that the distance from this place of collision to the beach about six miles to eastward of the light is about 150 miles.

The weather at and before the time of the collision was fine, the night was dark, but there was no difficulty in seeing lights a great distance off on the water, the wind about E. S. E.; the course of the Daphne was between N. E. and N. E. ½ N., sailing by the wind, with her starboard tacks on board, having the usual regulation green light on her starboard side and a red light on her port side, properly placed in the mizzen rigging and burning brightly, and keeping a good lookout.

The white masthead light of the steamship was seen from the bark about 11 o'clock p. m. on Friday night, the said 24th
75 March, at a distance off, as estimated, of about 12 miles, and about at 4 points on the bark's starboard and weather bow, and afterwards the steamship's red light was seen from the bark.

From the time of the first observation of the white light of the steamer the bark, with all sails set except the main royal and gaff topsail, was kept on her course northeast to northeast half north, sailing by the wind, making about six miles an hour, and without any change of her course, by the action of her helm, until the steamer was coming into her and within a distance off of about two of her lengths and angling a little from aft of the bark towards the bark's bow, as on a port helm, when an order was given to the wheelsman of the bark to keep off, and the bark had fallen off a little when she was struck by the stem of the steamship aft her fore-rigging on her starboard side, the steamship driving and cutting into the starboard side of the bark down from the rail and into the beams, breaking

the waterways and plank and doing other damage, which made it necessary for the bark to put back for repairs.

The steamship, on a course before the collision northwest by west, was on a course crossing that of the bark and presenting her red light, which was seen on the bark, and, without sails set, was making between seven and eight knots.

The green light of the bark was seen on the steamship at a distance off of six or seven miles and bearing west by south, four points on her port bow.

The steamship kept on her course without changing it until too close to allow her to come round under the bark's stern, and then her helm was ported, with helm hard-a-port, to bring her right round on her heel to the starboard and leave the bark on her port hand, in which maneuver the steamship struck the bark aft her fore-rigging, as aforesaid, stem on, after order to stop her engines and reverse full speed, as the bark was falling off.

II. The libellants sustained the damages from the injuries to the bark by the collision, as assessed by the commissioner and allowed by the district court.

76 III. The existing value of the steamship at the time of the collision, whether ascertained by reference to her condition before or after the collision, as left, rescued, or recovered therefrom, was from $140,000 to $150,000, and largely in excess of the claims of libellants.

IV. The subsequent stranding, so called, of the steamship on Fire island on the evening of March 25 was a distinct and independent occasion or cause of action, in no way growing out of, or connected with, the collision; and it was not directly from any peril of the sea, without the act of man mingling with it, but it was caused by the careless navigation and fault of the persons in charge of her while proceeding on her voyage after the collision for account of her owners.

V. That before the formal tender to the libellants in open court of the paper marked Claimants' Exhibit April 19, 1877, purporting a surrender of the interest of Mark Whitwill in the steamship Great Western as of the date of March 25, 1876, the owners of said steamship had, by a voluntary sale, without notice to the libellants, in April, 1876, or by abandonment to the underwriters with whom insurance had been effected on the steamship, transferred to other parties all interest or right of control which they might otherwise have had in the steamship.

VI. That before and at the time of the stranding referred to, the steamship was under insurance, effected by the owners thereof, to the amount of £34,000, which they realized from the insurance companies by the payment to them of that sum as for a total loss after tender of an abandonment.

77 *Conclusions of Law.*

I. In respect to the facts of the collision, it was the right and duty of the bark to keep her course, as the two vessels were approaching, and the duty of the steamer to keep away from her.

The bark having kept the course she was on as the two vessels were approaching, there can be no question under the circumstances of the case that the steamer was in fault in not clearing her, and that the respondent is chargeable for the damages caused by the collision.

II. Upon the application of the act of Congress, irrespective of any question of abandonment, there is no ground for contention that the liability of the respondents for the collision is limited to an amount less than the existing value of the steamship at or of the time of the collision, ascertained by reference to her condition after, as reduced by, or in consequence of, the collision, or as rescued or recovered therefrom.

III. That the liability of the owner of the steamship for damages from the collision is not limited to the value, as (further) reduced by a subsequent independent disaster, while proceeding on her voyage in charge of or through the negligence and fault of the persons in charge of the navigation of the steamship.

IV. That if, under any law applicable to the case, the proposed surrender tendered in open court might otherwise be effectual
78 or operative to discharge the respondents from liability for the collision, or limiting their liability, it could have no such effect after a previous transfer or cession of the ship to other parties by the owner divesting the latter of all control.

V. That the said proposed surrender of Mark Whitwell of his interest as part owner, irrespective of previous sale or cession, was of no effect.

VI. That the provisions of art. II, of sect. XXIII, of the French ordinance of 1681, "of the owners of ships," that the responsibility of the owner for deeds of the master, for which the owners shall be answerable, shall be discharged by an abandonment, so called, which, as used in that article, is a renunciation only of their ship and freight, and not an abandonment in the sense of that word in English and American law of insurance, or of corresponding act in French law, transferring title, has never been adopted by statute or usage in the United States as a rule of the maritime law, and forms no part of any general maritime law recognized or applied by the courts of the United States.

VII. The only abandonment of any effect under the act of Congress to discharge the liability of the owner of a ship for the particular cause is a transfer of the interest of the owner of the ship in the manner provided for in the statute for the benefit of the claimants of demands growing out of the same particular cause or occasion, and effectual to transfer the title, and of the date when the liability attached.

It would be unreasonable to hold that a transfer of the interest of the owner for the benefit of the claimants for damages could
79 be operative to discharge his liability after he had ceased to have any interest by his voluntary act upon which the transfer could operate.

VIII. No abandonment or transfer for the benefit of the libellants not of the whole ship could have any effect.

IX. And such abandonment without transfer of insurance effected upon the ship by the owner would be unavailing.

X. The principle of a limitation of the liability of the owner of a ship for the acts of the master, all or any, to the value for the voyage of the ship and freight is not the principle of the act of Congress, and forms no part of the jurisprudence of the United States.

XI. There is no law applicable to the case by which the liability of the respondent is limited, except by the amount of the damages to the libellants caused by the collision.

XII. The decree of the district court should be affirmed, with costs of this court.

JAMES K. HILL AND H. T. WING,
Proctors for Libellants.
C. VAN SANTVOORD,
Advocate and of Counsel.

80 The said judge thereafter, and on or about the 25th July, 1882, made and filed the following findings of fact and conclusions of law:

Circuit Court of the United States for the Eastern District of New York.

JENS THOMMESSEN and JULIUS SMITH
vs.
MARK WHITWILL and others.

In this case I find the following facts:

The bark Daphne, of Arendal, Norway, where she was built, left Baltimore, Maryland, in good condition on the 18th of March, 1876, with a cargo of crude petroleum in barrels, bound to Marseilles, France, and passed out to sea on the 20th of March. On the 25th of March from 20 to 30 minutes after midnight the Daphne
81 was run into by the British steamship Great Western bound from Gibraltar to New York, with a cargo of merchandize. The place of collission was on the high seas 175 to 180 miles from Sandy Hook, and about 150 miles from the beach near Fire Island Light-house on Long Island. The weather at and before the time of the collision was fine. The night was dark, but there was no difficulty in seeing lights at a great distance on the water. The wind was about east southeast. The course of the Daphne was between northeast and northeast half north. She was sailing by the wind on her starboard tack and had the usual regulation lights, green on her starb-ard side and red on her port side, properly placed and burning brightly and was keeping a good lookout. The white masthead light of the steamship was seen from the bark at about 11 o'clock p. m., at a distance off, as estimated, of about twelve miles and about four points on the bark's starboard and weather
82 bow, and afterwards the steamship's red light was seen from the bark. From the time of the first observation by the bark of the white light of the steamer the bark, with all her sails set, except the main royal and gaff topsail, was kept on her course, half north, sailing northeast to northeast by the wind, making about six miles an hour, and without any change of her course by the

action of her helm until the steamer was coming into her, and was within a distance off of about two of her lengths and angling a little from aft of the bark towards the bark's bow, as on a port helm, when an order was given to the wheelsman of the bark to keep off, and the bark had fallen off a little, when she was struck by the stem of the steamship aft of her fore rigging on her starboard side, the steamship cutting into the starboard side of the bark down from the rail and into the beams, breaking the water ways and
83 plank, and doing other damage which made it necessary for the bark to put back for repairs.

The steamship was on a course before the collision northwest by west, crossing that of the bark, and without sails set was making between seven and eight knots an hour.

The green light of the bark was seen from the steamship at a distance off of 6 or 7 miles, bearing west by south, 7 points on her port bow.

The steamship kept on her course without changing it until she was too close to allow her to go under the bark's stern, and then her helm was ported hard-a-port to bring her around to the starboard and leave the bark on her port hand, in which manœuvre she struck the bark aft of her fore rigging as aforesaid, stem on, after an order was given to stop her engines and reverse full speed, as the bark was falling off.

The libellants sustained damages from the injuries to the
84 bark by the collision, as allowed by the district court, in the sum of $7,023.44. The value of the steamship at the time of the collision, whether ascertained by reference to her condition before the collision or to her condition after the *condition* and before her stranding, was from $140,000 to $150,000. The libellants are and were, at the time of the filing of the libel herein and of said collision, residents of Arendal, in Norway, and subjects of the Kingdom of Norway and Sweden, and there domiciled, and owners of said bark. The respondent, Mark Whitwill, was at the same times a resident of Bristol, in England, and a subject of the United Kingdom of Great Britain and Ireland, and there domiciled, and one of the owners of the said steamship.

After the said collision and on the same 25th of March, while still on said voyage, and before reaching New York, the said steamship was stranded and wrecked on the southern coast of Long Island, from a cause in no way growing out of or connected with said collision,
85 and not directly from any peril of the sea or without the act of man mingling with it, but by the careless navigation and fault of the persons in charge of her. No freight is shown to have been received on said voyage.

The owners of the said steamship, on the 28th and 29th of March, 1876, duly made an abandonment of the said steamship to the various underwriters who had insured her. Before and at the time of said stranding the said steamship was under insurance, effected by the owners thereof, to the amount of £34,000, which they realized from the insurance companies by the payment to them of that sum, as for a total loss, after tender of an abandonment. After said

abandonment and on various dates down to the 12th of May, 1876, the wreck of the said steamship and the materials saved therefrom were duly sold at public auction for account of whom it might concern. Such sale was duly and publicly advertized in the city
86 of New York, but no notice of it was otherwise given to the libellants. It was made for the account of the said underwriters, and was made pursuant to directions from the owners, and after paying the expenses of saving and selling the property it realized the sum of $1,796.14. On the 27th of March, 1876, the master of the said bark, acting as agent for the libellants, who were not then in this country, commenced this action in their name.

The respondent, Mark Whitwill, was not in this country. A process of foreign attachment against the property of the respondents was issued, under which the steamer "Cornwall," in which the respondent Whitwill had an interest, was attached, and he appeared generally and answered in the cause. On the trial in the district court, and also on the trial in this court, his answer was ordered to be amended by adding at the close of the 7th article thereof the words "and he hereby surrenders the same to the libellants."
87 On the trial in the district court, and also on the trial in this court, the counsel for the respondent Whitwill tendered to the other side in open court a paper, of which the following is a copy, and asked the court to note the fact, and also put in evidence the said paper, subject to objection then made by the libellants' counsel:

"Know all men by these presents, that I, Mark Whitwill, of Bristol, England, heretofore part owner of the steamship Great Western, do hereby surrender to Jens Thommessen and Julius Smith, of Arendal, Norway, owners of the bark Daphne, all my interest in the said steamship Great Western and her freight as of the date of March 25th, 1876.

In witness whereof, I have hereto set my hand, this 19th day of April, 1877.

MARK WHITWILL,
By W. D. MORGAN, *Agent.*

In presence of—
CHAS. F. WELLS.

CITY AND COUNTY OF NEW YORK *ss:*

On this 19th day of April, 1877, before me personally came William D. Morgan, to me known, and known to be the same
88 person described in and who executed the foregoing instrument, as the agent of Mark Whitwill therein named, and to me known to be such agent, and he to me acknowledged that he executed such instrument as and for the act and deed of the said Mark Whitwill.

CHARLES F. WELLS,
Notary Public, New York.

Such paper was executed by the duly authorized agent of the said Whitwill and its execution was thereafter ratified by said Whitwill.

On the trial in this court the counsel for the respondent, Whitwill, offered to produce a paper, to be signed by said Whitwill by said Morgan, as his attorney, in all respects like the one above set forth, dated April 19th, 1877, except containing a transfer to a trustee for the benefit of the libellants, under the provisions of section 4285 of the Revised Statutes of the United States, if the court should be of opinion that such transfer to a trustee and not a surrender to
89 the libellants is necessary, and asked that in such event the answer be amended accordingly.

On the foregoing facts I find the following conclusions of law:

First. The steamer was wholly in fault for the collision, and the bark was not in fault.

Second. The liability of the respondent in this suit is limited to the value of his interest in the steamer in the condition in which she and the remnants of her were after her stranding and wreck, and he is liable in this suit to respond for such value, which, on the present proof, is the sum of $1,796.14, and for nothing more.

SAMUEL BLATCHFORD,
Circuit Justice.

And on the same day the said judge duly rendered and filed the following opinion:

90 BLATCHFORD, Justice:

That the steamship was wholly in fault in the collision and responsible for the damages caused to the bark; and that the bark was free from fault, and that the liability of the respondent, unless limited, follows that of the vessel, are propositions entirely clear and not contested.

The respondent contends that he is entitled to the benefit of the limitation of liability provided for by the statutes of the United States. The provisions on the subject in force at the time of this collision are found in sections 4282 to 4285 of the Revised Statutes, which are as follows:

"SEC. 4282. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board any such vessel by reason or by means of any fire happening to or on board the vessel, unless such fire is
91 caused by the design or neglect of such owner.

"SEC. 4283. The liability of the owner of any vessel for an embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending.

"SEC. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever on the same voyage, and the

whole value of the vessel and her freight for the voyage is
92 not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property and the owner of the vessel, or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

"SEC. 4285. It shall be deemed a sufficient compliance, on the part of such owner, with the requirements of this title, relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction to act as such trustee, for the person who may prove to be legally entitled
93 thereto; from and after which transfer all claims and proceedings against the owner shall cease."

Sections 4282 to 4285 of the Revised Statutes are re-enactments of sections 1, 3, and 4 of the act of March 3rd, 1851 (9 U. S. Stat. at Large, 635, 636), which sections were as follows:

"SECTION 1. No owner or owners of any ship or vessel shall be subject or liable to answer for, or make good to any one or more person or persons, any loss or damage which may happen to any goods or merchandise whatsoever which shall be shipped, taken in, or put on board any such ship or vessel by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners: provided, that nothing in this act contained shall prevent the
94 parties from making such contract as they please, extending or limiting the liability of ship-owners.

"SEC. 3. The liability of the owner or owners of any ship or vessel for any embezzlement, loss, or destruction by the master, officers, marines, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel and her freight then pending.

"SEC. 4. If any such embezzlement, loss, or destruction shall be suffered by several freighters or owners of goods, wares, or
95 merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel and her freight for the voyage shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court for the purpose of apportion-

ing the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto; and it shall be deemed a sufficient compliance with the requirements of this act on the part of such owner or owners if he or they shall transfer his or their interest in such vessel or freight for the benefit of such claimants to a trustee, to be appointed by any court of competent
96 jurisdiction to act as such trustee, for the person or persons who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner or owners shall cease."

The case of Nat. Steam Nav. Co. *v.* Dyer (the case of the Scotland), decided by the Supreme Court March 20, 1882, 4 Morr. Trans., 277, is authority for the following points:

(1.) The act of 1851 applies to owners of foreign as well as of domestic vessels, and to cases of col-ision on the high seas as well as in the waters of the United States, except when the col-ision occurs between two vessels of the same foreign nation, and it is shown what the law of that nation is, or perhaps of two foreign nations having the same maritime law, and it is shown what that law is.

(2.) The maritime law of the United States, as found in the
97 act of 1851, is the same as the maritime law of Europe, and is different from that of Great Britain in this, that the former gauges the liability by the value of the guilty ship, and her freight after the loss or injury caused by the collision, and the latter by the value before such loss or injury not exceeding £15 per ton.

(3.) The maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country.

(4.) The courts of every country will administer justice according to its laws unless a different law be shown to apply; and such rule applies to transactions on the high seas, so that, when a collision occurs on the high seas between two vessels, controversies arising therefrom will be governed in the courts of this country by our laws unless the two colliding vessels belong to the same country,
98 or, perhaps, to different countries using the same law, when they will be governed by such foreign law, if it be proved.

(5.) Ship-owners may avail themselves of the defence of limited liability by answer or plea, as well as by the form of proceeding prescribed by the rules promulgated by the Supreme Court on the subject, at least so far as to obtain protection against the libellants in a suit in admiralty to recover for the damages caused by the collision.

(6.) If the ship-owners pleaded the statute in such suit, a decree may be made in it requiring them to pay into court the limited amount for which they are liable, and distributing the said amount *pro rata* among the libellants, such proceedings being an "appropriate" proceeding under the statute.

(7.) It is not necessary that the owners of the guilty vessel should surrender and transfer her in order to claim the benefit of the statute, but they may plead their immunity in such suit, and,

99 if found in fault, may abide a decree against them for the value of such vessel and her freight, as found by the proofs.

The answer in this case alleges that if the claim of the libellants for damages shall be established against the respondent the liability of the respondent therefore "is limited to the amount or value of his interest in the said steamer Great Western and her freight upon the voyage during which such collision occurred, and this respondent's said interest in said steamer and freight is of no value whatever." The answer was sworn to and filed November 25, 1876. The collision occurred March 25, 1876. The answer does not set up that the steamer was stranded or suffered any injury on her voyage after the collision before reaching New York. Still the allegation in the answer as to the limitation of the liability of the respondent
100 must be held to be adequate to allow him the benefit of such limitation of liability as the statutes of the United States afford to him. The allegation that his interest is of no value may be regarded as surplusage, leaving open the question as to what is the amount or value of his interest for which he is to be held liable. The bark was a Norwegian vessel and the steamer was a British vessel, and no law of either country is proved as a fact. Therefore the case must be governed by the provisions of the statutes of the United States.

The respondent contends that his liability cannot exceed the sum of $1,796.14, as being the value of his interest in the steamer and her freight at the end of her voyage after her loss by stranding. The question as to the proper rule in a case like the present has not been decided by the Supreme Court, no such case having
101 been before it. In Norwich Co. *vs.* Wright, 13 Wall., 104, the offending steamer, the City of Norwich, was so injured by the collision that she took fire as a direct consequence of such injury, and was so burned that she sank. In that case the Supreme Court said: "By the maritime law the liability of the ship-owner was limited to his interest in the ship and freight for all torts of the master and seamen, whether by collisions or anything else, and sometimes even for the master's contracts, and his liability was so strictly limited that he was discharged by giving up that interest or by the vessel being lost on the voyage." The court then went on to hold that the act of 1851 covered a limitation of liability in case of injury to another vessel or her cargo by a collision. It then proceeded to say that the act of 1851 contained a provision
102 whereby the ship-owner could discharge himself, as in the maritime law, by giving up the vessel and her freight; that such a provision was not found in the statutes of Great Britain, Massachusetts, or Maine, and could not have been inserted without direct reference to the like provision of the maritime codes, and that the act of 1851 intended to adopt the rule of the maritime law on the subject so far as relates to torts. This was a decision that the owner of the steamer could avail himself of the benefits of the act of 1851 by surrendering the steamer and any freight that might have accrued without paying what was the value of the steamer before the collision and the value of the freight for the voyage. In

the case of *In re* The Norwich, &c., Co., 17 Blatchf., C. C. R., 221, the owner of the steamer the City of Norwich petitioned for a limitation of its liability growing out of said collision. It was
103 found by the court that within half an hour after the collision the boat took fire and was so burned that she sank in about 20 fathoms of water, and that the fire was a direct consequence of the collision and inseparable from it. The court (Mr. Justice Strong) said:

"The limit of liability prescribed by the act of Congress is that it shall in no case exceed the amount or value of the interest of the owner or owners in the offending ship or vessel and her freight then pending. This presents the question at what point of time is the value of the owner's interest to be taken? Is the measure of the owner's liability or its maximum the value of the ship and her freight before the injury was done, or the value at some time subsequent to the injury, when proceedings may be instituted to ascertain its amount, or is it the value immediately after the fault
104 has been committed, as, for example, in a case of collision immediately following the collision caused by it?"

The court then held that by the maritime law all that the sufferers by the misconduct of an offending vessel were entitled to was the vessel itself, after the injury had been committed, together with her freight; that that was the measure of liability adopted by the act of 1851; that the owners of the steamboat were not liable to the extent of the value of the steamboat immediately before the collision, and that such was the decision in 13 Wall., 104. The steamboat had been raised and repaired, and had become of the value of $70,000 before the petition for a limitation of liability was presented. It was argued that that value must be taken as the measure of the owner's liability. As to this the court said:

105 "To hold that the owners are liable to the extent of that valuation would be substantially to require them to surrender not only the ship and her freight, but also a sum of money equal to all they expended upon her in raising and repairs. Such, I think, would be a departure from the obvious meaning of the statute and not required by the maritime law. I cannot doubt that the measure of liability recognized by the maritime law and by the act of Congress is the value of the offending ship in the condition in which she was immediately after the disaster, adding the freight. Then the claims of the persons injured arose, the claims which the statute limits. The extent of the limitation is not a shifting one, varying with the times when the protection of the act may be sought, any more than it can be enlarged or diminished by the choice of the mode of obtaining that protection. Certain it is that if im-
106 mediately after the collision the steamboat owners had surrendered the vessel and freight or transferred them to a trustee they would have been discharged. Her value and her freight then pending were, then, all that they were liable for. That was, then, the extent of their loss. I cannot see that their liability can be increased by anything that may have occurred thereafter. It is the vessel as she then was that could have been transferred in

satisfaction of all claims if the owners had elected that mode of obtaining their discharge, and it is the value as it then was, which is the equivalent of the vessel, that might then have been paid in pursuance of an apportionment made by the court. Had the vessel proceeded on her voyage after the collision, and had she met with a second disaster, occasioned by the fault of the master, by which her
107 value had been greatly reduced, could she then have been surrendered or transferred in full satisfaction of the claims against her or her owners arising out of her first fault? Would her value after the second disaster have been the measure of the owner's liability? I cannot think such a position can be maintained. Surely such is not the spirit of the statute, and, if not, it seems equally plain that the liability of the owner is not enlarged by the fact that after the collision the boat has been raised and repaired by them at large expense, or, in other words, has increased in value.

The liability of the owner is discharged either by transferring the vessel and her freight or by paying their equivalent; that is, the value of what they might have transferred in discharge according to the apportionment of the court. The owners have their
108 option of these two modes: They may give up the vessel and freight or they may retain them and pay their value. But the measure or limit of liability in each case is the same. Very plainly it is not intended that the creditors shall obtain more when one mode of proceeding is adopted than when the other is followed. But, as I have said, all that the owners are required to transfer is the ship in her damaged condition, as she was immediately after the injury was inflicted. Equivalent to that is her value at that time."

The court held that the value of the boat immediately after the collision and fire, as she then was, lying at the bottom, which value was $2,500, together with her pending freight, was the extreme measure of the owner's liability and was the amount to be
109 apportioned. There was $600 of pending freight, but as it was wholly lost and not earned, it was held to have been of no value immediately after the collision, and the owner was held not to be liable for it.

In The Benefactor, 103 U. S., 239, 246, the court said:

"The counsel for the appellees is mistaken in supposing that the value of the offending vessel at the time of the collision furnishes the only criterion of the amount for which her owners are liable. In Norwich Co. *v.* Wright, 13 Wall., 104, we held that the owners of the offending vessel could, under the statute, discharge themselves from personal liability by surrendering the ship and freight. This would imply that the value of the ship at the time of the surrender, with the addition of the pending freight, if the surrender is made in a reasonable time, would furnish a proper criterion of the
110 amount of liability. In the case cited it was also said (p. 124) that if the vessel were libeled, and either sold or appraised, and her value deposited in court, this sum, together with the amount of the freight (when proper to be added), would constitute the *res* or fund for distribution. In England the value of the vessel imme-

diately before the collision was regarded as the true criterion of liability. But the English law is different from ours. It makes the owners liable to the extent of the value of the ship at the time of the injury, even though the ship itself be lost or destroyed at the same time, whereas our law, following the admiralty rule, limits the liability to the value of the ship and freight after the injury has occurred, so that if the ship is destroyed the liability is gone, and, whether damaged or not damaged, the owners may surrender
111 her in discharge of their liability. What may be the rule if, after the collision has occurred, the offending vessel should meet with other disasters greatly impairing her value, is a question which may require further consideration when the case arises. Nothing of the kind is alleged in the present case."

In Nat. Steam Nav. Co. *v.* Dyer, 4 Mon. Trans., 277, the court said:

"In the case of Norwich Co. *v.* Wright, 13 Wall., 116, we had occasion to state that the general maritime law of Europe only charges innocent owners to the extent of their interest in the ship for the acts of the master and crew, and that if the ship is lost their liability is at an end. But whilst this is the rule of the general maritime law of Europe, it was not received as law in England, nor in
112 this country, until made so by statute. The English statutes, indeed, have not yet adopted to its full extent the maritime law on this subject. They make the owners responsible to the value of the ship and freight at the time of the injury—that is, immediately before the injury—although the ship be destroyed or injured by the same act, or afterwards in the same voyage; while our law adopts the maritime rule of graduating the liability by the value of the ship after the injury as she comes back into port and the freight actually earned, and enables the owners to avoid all responsibility by giving up the ship and freight, if still in existence, in whatever condition the ship may be, and without such surrender subjects them only to a responsibility equivalent to the value of the ship and freight as rescued from the disaster. But whilst the rule adopted by Congress is the same as the rule of the general maritime
113 law its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law, and must be interpreted and administered as such."

In that case the Scotland, the offending steamer, suffered so severely from the collision that she sunk and was totally lost before she completed the voyage she was on at the time of the collision, and only some strippings were saved from her.

The question to be determined in the present case is, whether the respondent is freed from the liability he would have been under if the steamer, uninjured by the collision, had safely reached New York, by reason of the fact that she, after such collision, was herself lost during the same voyage from a cause not growing out of such collision.

114 An examination of section 4283 shows that the limitation of liability is applied to three distinct cases: (1) loss of property

shipped on the vessel; or (2) damage by collision to other vessels and their cargoes; or (3) any other damage or forfeiture done or incurred. Each is independent of the other. The occurrence of any one is sufficient ground for a limitation. The liability exists to the extent not affected by the limitation, and exists because of the happening of the event, the character of which is such that the liability is made to cease when it reaches such extent. The liability in each case comes into existence by the happening of the event, and goes on until it reaches in each case the amount or value of the interest of the owner in the vessel, if that is not greater than the loss or damage. If section 4283 stood alone, it might be said that it in-
115 tended to give the value of the interest in each case as it stands immediately after the incurring of the liability, as soon as all direct effect of the event creating the liability upon the physical condition of the vessel has been suffered by the vessel. But no such view can be maintained when the provisions of sections 4284 and 4285 are considered in connection with those of 4283. By section 4284, whenever any loss is suffered by several owners of property on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each, they are to receive compensation from the ship-owner in proportion to their respective losses. The whole value of the vessel and her freight is to be applied to all the losses named in section 4283, though there may be a loss of each of two or of all of said three kinds on
116 the same voyage. Thus there may be the loss or destruction of the property shipped on the vessel, creating at the time a liability, and afterwards, on the same voyage, she may negligently collide with and damage another vessel, creating thereby another liability.

There is, then, under section 4284 a loss suffered by several owners of property on the same voyage. If the value of the vessel and her freight for the voyage is not sufficient to compensate each owner —that is, all the owners suffering loss—the ship-owner is with such value to compensate all in proportion to their respective losses. After the happening of the event which caused the loss or destruction of the property shipped, which may have been an explosion or a leakage of liquids, the vessel may have been left of sufficient value to compensate fully for such loss or destruction, but she may
117 have been so damaged by the collision as to make her value as left inadequate to compensate fully for the loss of the property shipped, and also for the damage caused to the other vessel by the collision. In such case the owner of the property shipped cannot claim full compensation. This loss must be put in with the other losses on the voyage, and he must be satisfied with his *pro rata* share of the value of the vessel and freight. The statute is express in section 4284 in including all losses on a voyage. What the losses are cannot be told till the voyage is fully ended. The "whole value of the vessel" mentioned in section 4284 means her value at the close of the voyage. If there be two or more los-es during the voyage, for which the ship-owner is liable, and the vessel, after the accruing of the liabilities and during the same voyage, is lost

herself, the clear meaning of the statute is that no one shall receive compensation for his whole loss. No different rule can be applied under the statute where the offending vessel is lost after the accruing of only one liability, and only one claim for loss is made by one owner of property lost. The proceedings for apportionment provided for by section 4284 may be taken where there is but one claim made, and the value of the vessel and her freight is not sufficient to make compensation fully for such claim. This is provided for by rule 54 in admiralty.

These views are supported by the provisions of section 4285, under which the ship-owner may make the required compensation and discharge his liability by transferring his interest in the vessel and freight to a trustee to be appointed by a court. This he can not do till an opportunity is given to do so. When he does it the interest to be transferred is the interest as it stands at the time of the transfer, if that is made in a reasonable time, and nothing has intervened amounting to a waiver or a forfeiture of the right to make the transfer. These views are in accordance with what has been held to be the general principle of the statute of the United States, namely, an adoption of the maritime law of Europe in respect to a limitation of liability for torts of the master and crew.

It is declared in Norwich Co. *v.* Wright that by the maritime law the ship-owner was discharged by the loss of the vessel on the voyage, or by giving up what was left of her after a disaster to her on the voyage.

Again, in Nat. Steam Nav. Co. *v.* Dyer, the rule of the maritime law is stated to have been only to charge innocent owners to the extent of their interest in the ship for the acts of the master and crew, and to regard their liability as at an end if the ship was lost, and it is there said that our statute adopts such maritime rule. The reservation made in the case of the Benefactor, that a question like that in the present case may require further consideration when it arises, must be accepted as only an expression of that proper judicial caution which leaves open in form questions that are not *sub judice.*

No effect can arise from the fact that the Great Western was stranded by the negligence of her master and crew. The collision with and sinking of the bark were caused by the negligence of the master and crew of the steamer. Yet the ship-owner's liability for such negligence is subject to limitation. If the subsequent loss of the offending vessel destroys his liability, it must do so whether the loss be caused by the negligence of the master and crew or by a peril of the sea without such negligence. The general principle of the maritime law and of our statute is that the ship-owner exposes to loss, resulting from the faults or neglects of the master and crew, to whose care he intrusts his vessel, only the property intrusted to them, and can free himself from liability for such faults or neglects by surrendering such property in the shape in which it comes back to him from their hands, so long as no privity or knowledge on his part attaches to any such fault or neglect or to any disaster which has befallen the vessel during the voyage. In accordance

with this principle the statute allows an opportunity for such
122 surrender. It could not be I made in this case between the time of the collision and the time of the stranding. The risk of the loss of the offending vessel is thrown, for the benefit of commerce, on the owner of the property damaged by her, so that if she is lost in the sea her value shall not again be lost to her owner.

Attention is directed by the libellants to the fact that the cases of the City of Norwich and the Scotland arose under the act of 1851, while the present case arose under the Revised Statutes and to certain differences of language between the two enactments. In section 3 of the act of 1851 it is said that the liability of the "owner or owners" shall not exceed the amount or value of the interest of "such owner or owners respectively" in the vessel. In section 4283 of the Revised Statutes it is said that the liability of "the
123 owner" shall not exceed the amount or value of the interest of "such owner" in the vessel. In section 4 of the act of 1851 it is said that "such owner or owners" may transfer "his or their interests." In section 4285 it is said that "such owner" may transfer "his interest." On these differences of language it is contended that the Revised Statutes exclude a limitation of the liability of a part owner to the value of his interest in the vessel and freight, and do not provide for any limitation short of the interest of the owner or owners collectively in the whole vessel. There is no force in this contention. By section 1 of the Revised Statutes it is provided that in determining the meaning of the Revised Statutes words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular. It was undoubtedly because
124 of this general provision that the language of the act of 1851 was condensed in the revision. Read by the light of such general provision, and in view of the principles on which the revision was made, it must be held that the new language in sections 4283 and 4285 is the result merely of revision, simplification, rearrangement, and consolidation, with a view to the re-enactment of the same substance and meaning. Murdoch *v.* City of Memphis, 20 Wall., 590, 617; Smythe *v.* Fish, 23 Wall., 374; U. S. *v.* Claflin, 14 Blatchf. C. C., 55; The L. W. Eaton, 9 Ben., 289, 298–303.

The above remarks apply also to the suggestion on the part of the libellants that section 4285 differs from section 4 of the act of 1851 in that it limits the operation of an abandonment to a discharge of the ship-owner's liability arising from the particular disaster
125 in respect of which the abandonment is authorized, while under section 4 of the act of 1851 a transfer had the effect to discharge the ship-owner from liability for all torts of the master during the voyage.

It follows, from these considerations, that the respondent is entitled to have his liability to the libellants limited to the value of his interest in the steamer, as such interest existed after she was stranded and wrecked, with the addition of her pending freight.

But the respondent contends that under section 4285 the libel must be dismissed, because he has made the transfer provided for

by making the transfer to the libellants dated April 19, 1877. Under the statute, the transfer, to be effective, must be a transfer of an existing interest in the transferrer, and he must not before have transferred his interest voluntarily to some other person.

126 By the abandonment to the underwriters and the subsequent sale of the wreck and of the materials saved therefrom for account of the underwriters, and pursuant to directions from the owners before any transfer to the libellants was made, such right of transfer was lost, and the attempted transfer was nugatory. The abandonment to the underwriters transferred to them the property. Whether, under the maritime law, there could or could not have been a surrender after an abandonment to underwriters, it is plain that our statute requires a transfer which will carry title; so that under rule 55, in admiralty, the transferee may realize the proceeds for the benefit of the person or persons entitled to damages.

It is contended by the libellants that no transfer which did not include the insurance money could be effective in this case,

127 and that the amount for which the respondent is to be held liable must include such insurance money. On the other hand, the respondents contend that the libellants have no interest in such money.

In Norwich Co. *v.* Wright, 13 Wall., 117, a remark of Pardessus (Droit Commercial, 3, tit., 2, c. 3, § 2) is quoted as follows: "The owner is bound civilly for all delinquencies committed by the captain within the scope of his authority, but he may discharge himself therefrom by abandoning the ship and freight, and if they are lost it suffices for his discharge to surrender all claims in respect to the ship and its freight."

The court adds, "such as insurance," etc. On the basis of this remark it is recited, in Dyer *v.* Nat. Steam Nav. Co., 14 Blatchf. C. Co., 483, 487, as the rule of the maritime law that if vessel and freight were lost the ship-owner could not discharge himself "with-

128 out surrendering all claims in respect of vessel and freight, such as insurance," etc. When the case of the City of Norwich came before this court on the petition of her owner for a limitation of liability (17 Blatchf. C. C., 221) it appeared that at the time of the collision she was insured against fire, not against marine disaster, and that her owner had received from the underwriters, as insurance money, some $49,000.

The question arose whether it should account for that money to the claimants for loss and damage by the collision, in addition to the value of the steamboat as she lay sunk after the collision and the fire. The court held that under the statute the liability extended only to what would pass to a trustee, and what was required to be transferred as a condition of discharge, was only the interest in the vessel and freight; that nothing was said about transferring

129 insurance; that a transfer of property insured does not transfer insurance, and that a policy of insurance is no interest in the thing insured. The court also examined the authorities and concluded that the maritime measure of liability did not extend to insurance upon the vessel, and that there is nothing in our statute

to enlarge such measure of liability. I think it is sufficient to rest the question on the plain language of the statute. The "interest" in the vessel which is the measure of the liability under section 4283, and a transfer of which, if made under section 4285, operates to discharge the claim for loss or damage, does not extend to what is not our interest in the vessel. It was easy for the statute to have provided for liability for and transfer of claims for insurance.
130 It fails to do so, whether the maritime law did so or not.

The question as to the value of the steamer and her pending freight after her wreck seems, in the evidence, to have been gone into to an extent sufficient to show, on the evidence as it stands, that such net value was only $1,796.14. But the libellants are at liberty, before a decree is entered on this decision, to apply to this court, on notice, on special cause to be shown by affidavit, for an order of reference to a commissioner to assess such value on the present evidence and on further proofs. The amount decreed against the respondent by the district court was $17,023.44 damages, with interest on $14,471.44 from May 6, 1876, as an average date, to the date of the decree, and $762.62 costs.

The respondent alone has appealed. He is entitled to his
131 costs in this court. As he contested the question of fault and negligence in the district court, by his answer, he is not entitled to costs in that court, but the libellants are entitled to costs in that court.

And thereafter, upon notice thereof, and before judgement or decree entered thereupon, the counsel for the libellants made and filed and served on respondent's counsel exceptions, as follows:

The libellants except to the rulings and decision of the judge in the trial and determination of the case for that he did not rul- and decide, as requested, that upon the application of the act of Congress, irrespective of any question of abandonment, there is no ground for contention that the liability of the respondent for the colli-
132 sion is limited to an amount less than the existing value of the steamship at or of the time of the collision, ascertained by reference to her condition after, as reduced by or in consequence of the collision, or as rescued or recovered therefrom.

The libellants except to the ruling and decision of the judge on the trial and determination of the case for that he did not rule and decide, as requested, that the liability of the owner of the steamship for damages from the collision is not limited to the value as further reduced by a subsequent independent disaster while proceeding on her voyage in charge of or through the negligence and fault of the persons in charge of the navigation of the steamship.

For that the judge did not rule and decide, as requested,
133 that if under any law applicable to the case, the proposed surrender tendered in open court might otherwise be effectual or operative to discharge the respondents from liability for the collision or limiting their liability, it could have no such effect after a previous transfer or cession of the ship to other parties by the owner divesting the latter of all control.

For that the judge did not rule and decide, as requested, that the

proposed surrender of Mark Whitwill of his interest as part owner, irrespective of previous sale or cession, was of no effect.

For that the judge did not hold and decide, as requested, that the provisions of liv. II, title VIII, article 2 of the Marine Ordinance of France of 1681, of the owners of ships, that the responsi-
134 bility of the owner for deeds of the master, for which the owner shall be answerable, shall be discharged by an abandonment, so called, which, as used in that article, is a renunciation only of their ship and freight, and not an abandonment in the sense of that word in English and American law of insurance, or of corresponding act in French law, transferring title, has never been adopted by statute or usage in the United States as a rule of the maritime law, and forms no part of any general maritime law recognized or applied by the courts of the United States.

For not holding and deciding, as requested, that the only abandonment of any effect under the act of Congress to discharge the liability of the owner of a ship for the particular cause being a transfer of the interest of the owner of the ship, in the manner pro-
135 vided for in the statute for the benefit of the claimants demands growing out of the same particular cause or occasion, and effectual to transfer the title, and of the date when the liability attached, it would not be reasonable to hold that a transfer of the interest of the owner for the benefit of the claimant for damage could be operative to discharge or limit his liability after he had ceased to have any interest, by his voluntary act, upon which the transfer could operate.

For that he did not hold and decide, as requested, that no abandonment or transfer for the benefit of the libellants not of the whole ship could have any effect.

For that he did not hold and decide, as requested, that no abandonment without transfer of insurance effected upon the ship
136 by the owner would be availing.

For that he did not hold and decide that the principle of the limitation of the liability of the owner of a ship for the acts of the master, all or any, to the value for the voyage of the ship and freight, is not the principle of the act of Congress, and forms no part of the jurisprudence of the United States.

For that he did not hold and decide that there was no law applicable to the case by which the liability of the respondent is limited, except by the amount of the damage to the libellants caused by the collision.

The libellants except to the finding or the findings of fact of the judge, as follows: On the trial in the district court, and also
137 on the trial in this court, his (the respondent's) answer was ordered to be amended by adding at the close of the 7th article thereof the words: "And he hereby surrenders the same to the libellants." On the trial in the district court, and also on the trial in this court, the counsel for the respondent Whitwill tendered to the other side in open court a paper, of which the following is a copy, and asked the court to note the fact, and also put in evidence the said paper, subject to objection then and there made by libellants' counsel.

Know all men by these presents, that I, Mark Whitwill, of Bristol, England, heretofore part owner of the steamship Great Western, do hereby surrender to Jens Thommesen and Julius Smith, of Arendal, Norway, owners of the bark Daphne, all my interest in the
138 said steamship Great Western and her freight as of the date of March 25th, 1876.

In witness whereof, I have hereto set my hand, this 19th day of April, 1377.

MARK WHITWILL,
By W. D. MORGAN, *Agent.*

In presence of—
CHARLES F. WELLS.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 19th day of April, 1877, before me, personally came William D. Morgan, to me known, and known to be the same person described in and who executed the foregoing instrument as the agent of Mark Whitwill, therein named, and to me known to be such agent, and he to me acknowledged that he executed such instrument as and for the act and deed of the said Mark Whitwill.

CHARLES F. WELLS,
Notary Public, New York.

Such paper was executed by the duly authorized agent of the said Whitwill, and its execution was thereafter ratified by said
139 Whitwill. On the trial in this court the counsel for the respondent, Whitwill, offered to produce a paper to be signed by said Whitwill, by said Morgan as his attorney, in all respects like the one above set forth, dated April 19th, 1877, except containing a transfer to a trustee for the benefit of the libellants, under the provisions of section 4285 of the United States, if the court should be of opinion that such transfer to a trustee, and not a surrender to the libellants, is necessary, and asked that in such event the answer be amended accordingly.

As unauthorized by any general maritime law which has been adopted by statute or usage in the United States as a rule of the maritime law; and also as immaterial and irrelevant for any purpose or on any question of limitation of liability under such law.

140 The libellants except to so much of the second conclusion of law as found by the judge as contained in the statement that the liability of the respondent in this suit on the facts as found by him is limited to the value of his interest in the steamer in the condition in which she and the remnants of her were after her stranding and wreck. And they except also to the limitation therein of the recovery of the libellants to such value as found by him to the sum of $1,796, and for nothing more.

The libellants except to said rulings of the judge for that on his findings of fact as to fault for the collision and of the amount of damages as found by the district court, and of the value of the

steamship at the time of the collision, whether ascertained by
141 reference to her condition before the collision, as to her condition after the collision and before her stranding, under the circumstances as found by him in his findings of fact, while proceeding on her voyage, he did not affirm the judgement of the district court without limitation to the value of the steamship as reduced by the subsequent stranding, under the circumstances as found by him.

The libellants except to the said rulings of the judge in limiting the recovery to the value of the respondent's interest in the steamer in the condition in which she and the remnants were after her stranding and wreck, without adding the insurance which had been effected, and which was realized by her owners, by reason of the casualty, as representing the ship.

142 The libellants further except to the rulings of said judge excluding from the libellants' recovery the value of the insurance upon said vessel and adopting the value of said steamship after her stranding as and for the limit of respondent's liability, notwithstanding an abandonment by respondent of all interest in said steamship to underwriters who had undertaken to insure all persons to whom said steamship might or should appertain against marine perils, and had further assured the risk of liability for collision.

JAS. K. HILL,
WING & SHOUDY,
Proctors for Libellants.
C. VAN SANTVOORD,
Advocate and of Counsel.

143 EXHIBIT "A."

£7,950.

Be it known that John Jupe, or as agent, as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from and for and during the space of twelve calendar months, commencing on the 24th day of May, 1875, and ending on the 23d day of May, 1876, both days inclusive, in port and at sea, in dock and on ways, at all times and upon all occasions whatsoever, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the "Great Western" (S.), whereof is master, under God, for this present voyage —, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning
144 the adventure upon the said goods and merchandise from the loading thereof aboard the said ship upon the said ship, &c., as above, with leave to tow, to be towed, and to assist vessels in all

situations, and to sail with or without pilots, and so shall continue and endure during her abode there upon the said ship, &c.

And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandise whatsoever, shall be arrived at as above upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, for all purposes, without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at £7,950.

On hull, materials, and furniture, &c., valued at	£24,000
Machinery and boiler, &c.	10,000
	£34,000

Touching the adventures and perils which we, the assurers, are contented to bear and to take upon us in this voyage, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, taking at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defense, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard street or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of seven guineas per cent. To return 11*s.* 8*d.* per cent. for every 30 consecutive days unexpired on cancelment, and 10*s.* 8*d.* per cent. for every 30 consecutive days the ship may be in port, underwriter's risk still continuing.

Collision Clause.

Recommended by the committee for managing the affairs of Lloyds,

after communication with the "Liverpool Underwriters' Association" and the "Salvage Association."

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of
146 money not exceeding the value of the ship hereby assured, calculated at the rate of eight pounds per ton on her registered tonnage, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, calculated at the rate of eight pounds per ton, or, if the value hereby declared amounts to a larger sum, then to such declared value; and, in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three fourth parts of the costs thereby incurred or paid; provided, also, that this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of loss of life or personal injury to individuals, for any cause whatsoever.

In witness whereof, we, the assurers, have subscribed our names and sums assured in London, 22 May, 1875.

N. B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent.; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded.

Running-down clause attached: Warranted free from capture, seizure, and detention, and the consequences of any attempt thereat. Average payable on each valuation as if separately insured, or on the whole general average payable according to foreign statement, if so made up. In the event of claim under this policy, no thirds off new for old to be deducted. Warranted not to proceed to the Baltic, Black, or White Sea, or British North America, Halifax excepted.

147 £100, John W. Janson, per H. Upton, one hundred pds., 22 May, 1875.

£100, D. Janson, per H. Upton, one hundred pds., May 22, 1875.

£100, E. F. Ross, per H. Upton, one hundred pds., 22 May, 1875.

£150, J. G. Inglis,
£150, H. Harris,
£150, W. H. Inglis,
£150, G. B. Foster,
£150, E. H. Wolton,
} per G. Wall, one hundred and fifty pds. each, 22 May, 1875.

£100, A. E. Secretan, per H. Secretan, one hundred pds., 22 May, 1875.

£100, Henry Secretan, one hundred pds., 22 May, 1875.

£100, Holford Secretan, per H. Secretan, one hundred pds., 22 May, 1875.

£100, L. M. Secretan, per H. Secretan, one hundred pds., 22 May, 1875.

£100, Stanley Hoole,
£100, Henry Green,
£100, C. E. Green,
} per T. A. Nicholls, one hundred pds. each, 22 May, 1875.

£100, And. Walls, one hundred pds., 22 May, 1875.

£100, W. Walls, per A. Walls, one hundred pds., 22 May, 1875.

£100, E. Bagehot, per J. Maclean, one hundred pds., 22 May, 1875.

£100, W. Bagehot, per J. Maclean, one hundred pds., 22 May, 1875.

£100, J. F. Bland, per J. Maclean, one hundred pds., 22 May, 1875.

£100, C. Leathley,
£100, C. A. Hardman,
£100, J. Young,
£100, J. S. Hill,
£100, J. Walker,
£100, T. Vigirs,
} per G. N. Cheesman, one hundred pds., 22 May, 1875.

£100, A. Maclean,
£100, J. P. Kidston,
£100, P. Maclean,
} per P. Maclean, one hundred pds., 22 May, 1875.

£100, Albert Gledstanes, per W. Lymondson, one hundred pds., 22 May, 1875.

148 £100, W. Lymondson, one hundred pds., 22 May, 1875.

£100, A. W. Young, per A. W. Young, one hundred pds., 22 May, 1875.

£100, W. T. Young, per A. W. Young, one hundred pds., 22 May, 1875.

£100, A. W. Young, one hundred pds., 22 May, 1875.

£100, Henry Burnand,
£100, William Tinine,
£100, Brand Sapte,
£100, Harry Burnand,
} per A. C. Burnand, one hundred pds. each, 22 May, 1875.

£100, G. W. Holt, one hundred pds., 22 May, 1875.

£100, Sam. P. Harper,
£100, J. P. Kennard,
£100, Sam. Harper,
£100, Francis Tagart,
} per Perry Harper, one hundred pds. each, 22 May, 1875.

£100, George Parbury, per D. S. Parbury, one hundred pds., 22 May, 1875.

£100, H. C. Cheeswright,
£100, W. T. Miskin,
£100, C. J. Northcote,
£100, G. C. Graves,
} per B. W. Granier, one hundred pds., 22 May, 1875.

£100, Wm. Redfern,
£100, Jas. Alexander,
£100, P. Vanberbyl,
} per C. Cocks, one hundred pds., 22 May, 1875.

£100, E. B. Howard, per H. J. Rumbal, one hundred pds., 22 May, 1875.

£100, D. A. Rougemont, per V. Wintle, one hundred pds., 22 May, 1875.

£100, H. Rougemont, per V. Wintle, one hundred pds., 22 May, 1875.

£100, A. Rougemont, per V. Wintle, one hundred pds., 22 May, 1875.
£100, Charles Scott, one hundred pds., 22 May, 1875.
£100, Wm. Seringeour, per C. Scott, one hundred pds., 22 May, 1875.
£100, J. Vanner, £100, J. E. Vanner, } per J. Coles, one hundred pds. each, 22 May, 1875.
£100, H. Brockett, £100, J. Bramley Moore, £100, J. A. Bramley Moore, } per J. S. Corwin, one hundred pds. each, 22 May, 1875.
149 £100, W. W. Lodge, per Chas. Alf'd Beattie, one hundred pds., 22 May, 1875.
£100, Chas. Alf'd Beattie, one hundred pds., 22 May, 1875.
£50, A. O. Wilkinson, £50, M. Beck, £50, George Duncan, £50, Francis Beck, } per G. W. Beck, fifty pds. each, 22 May, 1875.
£50, Stephen White, £50, W. B. Liddiard, £50, W. C. Maxwell, £50, G. R. Blount, } per E. Beauchamp, fifty pds. each, 22 May, 1875.
£50, Thos. Boddington, £50, R. Davis, £50, E. P. Stringer, £50, E. Pembroke, } per W. Boddington, fifty pds. each, 22 May, 1875.
£100, J. McMarster, per W. Robertson, one hundred pds., 22 May, 1875.
£100, A. Lawrence, per W. Robertson, one hundred pds., 22 May, 1875.
£100, R. MacLeed, per W. Robertson, one hundred pds., 22 May, 1875.
£100, A. W. Bathe, per W. Robertson, one hundred pds., 22 May, 1875.
£100, Geo. Blundell, per W. Leggatt, one hundred pds., 22 May, 1875.
£100, J. D. Bowdillon, per W. Leggatt, one hundred pds., 22 May, 1875.
£100, W. R. Winch, per W. Leggatt, one hundred pds., 22 May, 1875.

(Endorsed:) Settled a total loss on this policy of one hundred pounds per cent., without prejudice. Cr. John Jupe. 18 April, 1876.

Here follows initials of the respective underwriters:

EXHIBIT.

£3,050.

Be it known that John Jupe, or as agent, as well in his
150 own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part, or in all, doth make assurance, and cause himself and them, and every of them, to be insured, lost or not lost,

at and from, and for and during the space of twelve calender months, commencing on the 24th day of May, 1875, and ending on the 23d day of May, 1876, both days inclusive, in port and at sea, in docks and on ways, at all times and upon all occasions whatsoever, with the leave to tow, to be towed, and to assist vessels in all situations, and to sail with or without pilots, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the Great Western (S.), whereof is master, under God, for this present voyage ——, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship or the master thereof is or shall be named or called, beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship, as above, upon the said ship, &c., and so shall continue and endure during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever shall be arrived at, as above, upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandizes until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever for all purposes, without prejudice to this insurance. The said ship, &c., goods and merchandizes, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall
151 be valued at £3,050.

On hull, materials, furniture, &c., valued at	£24,000
" machinery and boilers, &c.	10,000
	£34,000

So valued.

Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in this voyage; they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever; barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes and ship, &c., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandizes and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute, each one according to the rate and quantity of his sum herein assured. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard street or in the

Royal Exchange or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured at and after the rate of seven guineas per cent. To return 10*s.* 8*d.* per cent. for every 30
152 consecutive days the ship may be in port unemployed, and 11*s.* 8*d.* per cent. for every 30 consecutive days expired on cancelment and arrival.

Collision Clause.

Recommended by the committee for managing the affairs of Lloyds, after communication with the "Liverpool Underwriters' Association" and the "Salvage Association."

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of eight pounds per ton on her registered tonnage, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, calculated at the rate of eight pounds per ton, or if the value hereby declared amounts to a larger sum, then to such declared value; and in cases where the liability of the ship has been contested with our consent in writing we will also pay a like proportion of three-fourths parts of the costs thereby incurred or paid; provided, also, that this clause shall in no case extend to any sum which the insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals for any cause whatsoever.

In witness whereof, we, the assurers, have subscribed our names and sums assured in London, 27th May, 1875.

153 N. B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general or the ship be stranded.

Running down clause attached. Warranted free from capture, seizure, and detention, and the consequences of any attempt thereat. Average payable on each valuation as if separately insured or on the whole. General average payable according to foreign statement if so made up. In the event of claim under this policy no thirds off new for old to be deducted. Warranted not to proceed to the Baltic, Black, or White seas, or British North America, Halifax excepted.

£150, H. Bowers,
£150, C. W. Bowers,
£150, R. Jones,
£150, M. Yeatman,
} per R. Jones, one hundred and fifty pds. each, May, 1875.

£150, J. Dennistown,
£150, P. Rentoul,
£150, A. J. Adderley,
£150, W. H. Ross,
} per C. B. Duncomb, one hundred and fifty pds. each, 27 May, 1875.

£150, J. C. Andrede,
£150, J. J. Cherry,
£150, H. Simson,
} per Fred'k G. A. Porah, one hundred and fifty pds. each, 27 May, 1875.

£100, W. Coterworth,
£100, L. C. Wakefield,
£100, D. Powell, Jr.,
£100, H. P. Powell,
} per P. Pudgett, one hundred pds. each, 27 May, 1875.

£100, Fred. Malcaish,
£100, J. Malcaish,
£100, W. O. Malcaish,
} per A. C. Brown, one hundred pds. each, 27 May, 1875.

£100, Julius A. Reiss,
£100, Emil Reiss,
£100, Wm. Elliott,
£100, J. Edw'd Reiss,
} per B. Elliott, one hundred pds. each, 27 May, 1875.

£100, Arthur P. May,
£100, E. F. Elliott,
£100, J. P. Law,
} per A. P. May, one hundred pds. each, 27 May, 1875.

154 EXHIBIT.

The Globe Marine Insurance Company, Limited, London.

No. 53971. £1,000.

Whereas John Jupe or an agent represented to the Globe Marine Insurance Company, Limited, that he is interested in, or duly authorized as owner, agent, or otherwise, to make the insurance hereinafter mentioned and described with the said company, and has promised to pay forthwith, for the use of the said company, at the office of the said company, the sum of seventy-three pounds ten shillings, as a premium or consideration at and after the rate of seven guineas per cent., for such insurance.

Now this policy of insurance witnesseth that, in consideration of the premises and of the said sum of £73.10.0, the said Globe Insurance, Limited, do promise and agree with the said John Jupe, his executors, administrators, and assigns, that the said company will pay and make good all such losses and damages hereinafter expressed as may happen to the subject-matter of this policy, and may attach to this policy, in respect to the sum of one thousand pounds hereby insured, which insurance is hereby declared to be upon hull, &c., valued at £34,000. In event of average no ⅓rd new for old to be deducted. General average as per foreign statement, if so made up. The ship or vessel called the "Great Western (S)," whereof is at present master, or whoever shall go for master of the said ship or vessel, lost or not lost, at and from and

for and during the space of twelve calendar months, commencing on the twenty-fourth day of May, 1875, and ending on the 25th day of May, 1876, both days inclusive. In port or at sea, in dock and on ways, at all times and in all places and services. War-
155 ranted not to proceed to or from the Baltic, Black, or White seas, nor British North America, Halifax excepted.

To return 11/8 per cent. for each uncommenced month, if cancelled. To return 10/8 per cent. for each 30 consecutive days laid in port and arrival.

And the said company promises and agrees that the insurance aforesaid shall commence upon the said ship at and from ———, and shall continue until she hath moored at anchor in good safety at her place of destination, and for such period afterwards, not exceeding twenty-four hours from such mooring, as she shall be there occupied in discharging her cargo.

And it shall be lawful for the said ship or vessel to proceed to and sail to and touch and stay at any ports or places whatsoever in the course of her said voyage for all necessary purposes, without prejudice to this insurance.

And touching the adventures and perils which the said company are made liable unto or are intended to be made liable unto by this insurance they are, of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof.

And in case of any loss or misfortune it shall be lawful to the insured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard, and recovery of the aforesaid subject-matter of this insurance, or any part thereof, without prejudice to this insurance, the charges whereof the said company will bear in proportion to the sum hereby insured. And it is expressly de-
clared and agreed that no acts of the insurer or insured in
156 recovering, saving, or preserving the property insured shall considered as a waiver or acceptance of abandonment.

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of eight pounds per ton on her registered tonnage, the said company will pay the assured such proportion of three-fourths of the sum so paid as the sum hereby assured bears to the value of the said ship; and in cases where the liability of the ship has been contested with the consent in writing of the said company, the said company will also pay a like proportion of three-fourth parts of the costs thereby incurred or paid; provided, also, that this

clause shall in no case extend to any sum which the insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals from any cause whatsoever.

And it is declared and agreed that corn, fish, flour, salt, fruit, and seed shall be and are warranted free from average, unless general, or the ship be stranded, and that sugar, rum, hides, skins, hemp, flax, and tobacco shall be and are warranted free from average, under five pounds per centum; that all other goods, also the ship and freight, shall be and are warranted from average, under a three-pounds per centum, unless general, or the ship be stranded.

Warranted free from capture, seizure, and detention, and all the consequences thereof or any attempt thereat, and all other consequences of hostilities.

In witness whereof, the said company have hereunto affixed their common seal, this 22nd day of May, 1875.

157 N. B.—The usual deduction of one-third of the amount of repairs is not made by this company in the case of ships built within the limits of the United Kingdom until after eighteen months of the date of the original register.

(Signed) JOHN PARSONS, *Director.*

Examind: E. C.

Countersigned:
B. FRANCIS COBB, *Secretary.*

EXHIBIT.

Home & Colonial Marine Insurance Company, Limited.

Capital, one million pounds sterling.

No. 107,903. £1,000.

Whereas J. Jupe, or as agent, has represented to The Home and Colonial Marine Insurance Company, Limited, that he is interested in, or duly authorized as owner, agent, or otherwise to make the insurance hereinafter mentioned and described, with the said company, and has promised or otherwise obliged himself to pay to the said company the sum of seventy-three pounds ten shillings as a premium or consideration at and after the rate of seven guineas per cent. for such insurance.

Now, this policy of insurance witnesseth that in consideration of the premises and of the said sum of £73.10.0 the said company promises and agrees with the said J. Jupe, his executors, administrators, and assigns, that the said company will pay and make good all such losses and damages hereinafter expressed as

158 may happen to the subject-matter of this policy, and may attach to this policy, in respect of the sum of —— pounds hereby insured, which insurance is hereby declared to be upon:

Hull, &c., valued at	£24,000
Machinery, " "	10,000
	£34,000

Average payable on each valuation as if separately insured, or on the whole without deduction of one-third new for old. General average as per foreign statement if so claimed. Running down clause, as attached. On the ship or vessel called the "Great Western" (S) whereof ——— is at present master, or whoever shall go for master of the said ship or vessel, lost or not lost, at and from and for and during the space of twelve calendar months, commencing on 24th May, 1875, and ending on the 23rd May, 1876, both days inclusive. In port and at sea, in docks and on ways, at all times, in all places, on all services, and all occasions, and in all situations.

And the said company promises and agrees that the insurance aforesaid shall commence upon the said ship at and from —— and shall continue until she has moored at anchor in good safety at her place of destination, and for such period afterwards not exceeding twenty-four hours from such mooring as she shall be there occupied in discharging her cargo, and upon the freight and goods or merchandise on board thereof, from the loading of the said goods or merchandise on board the said ship or vessel at, as above, and until the said goods or merchandise be discharged and safely landed at —, as above.

And that it shall be lawful for the said ship or vessel to proceed and sail to and touch and stay at any ports or places whatsoever in the course of her voyage for all necessary purposes without prejudice to this insurance. And touching the adventures and perils which the said company are made liable unto or
159 are intended to be made liable unto by this insurance they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, kingdom, or quality soever; barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof. And, in case of any loss or misfortune, it shall be lawful to the insured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the aforesaid subject-matter of this insurance, or any part thereof, without prejudice to this insurance, the charges whereof the said company will bear in proportion to the sum insured. And it is declared and agreed that corn, fish, salt, fruit, flour, and seed shall be and are warranted free from average unless general or the ship be stranded, and that sugar, tobacco, hemp, flax, hides, and skins shall be and are warranted free from average under five pounds per centum; that all other goods, also the ship and freight, shall be and are warranted free from average under three pounds per centum, unless general or the ship be stranded.

And it is expressly declared and agreed that no acts of the insurer or insured, in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment.

Warranted free from capture and seizure and detention and all

the consequences thereof, or of any attempt thereat, anything hereinbefore contained to the contrary notwithstanding.

160 *Collision Clause.*

Recommended by the committee for managing the affairs of Lloyds, after communication with the "Liverpool Underwriters' Association" and the "Salvage Association."

And it is further agreed, that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, over any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of eight pounds per ton on her registered tonnage, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, calculated at the rate of eight pounds per ton, or, if the value hereby declared amounts to a larger sum, then to such declared value; and, in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three-fourth parts of the costs thereby incurred or paid; provided, also, that this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of loss of life or personal injury to individuals, for any cause whatsoever.

To return 10*s.* 8*d.* per cent. for every consecutive 30 days the vessel may be laid up in port or in dock, the Co.'s risk continuing, and 11*s.* 8*d.* per cent. for each uncommenced month this policy may be cancelled on arrival.

In witness whereof, the undersigned, on behalf of the said company, have hereunto set their hands, in London, the nineteenth day of May, 1875.

Examined: R. E. B.

(Signed) JOHN SWINDELL, *Director.*

Countereigned:

(Signed) I. A. CLARK, *Secretary.*

161 EXHIBIT —.

Mercantile Marine and Fire Insurance Company of South Australia.

Incorporated by act of the Parliament of South Australia.

Subscribed capital, £250,000, with power to increase to £1,000,000.

London agency, 2 and 3 Birchen Lane, E. C.

No. 6770. £500.

Be it known that John Jupe, or as agent, as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, does make assurance and cause himself and them, and every of them, to be insured, lost or not lost, at and from say for and during

the space of twelve calendar months from the 24th day of May, 1875, to the 23d day of May, 1876, both days inclusive, as employment may offer, in port and at sea, in dock and on ways, at all times and in all places; subject to the conditions of the collision clause, as per slip attached, including risk of craft to and from the ship.

Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the "Great Western" (S.), whereof is master under God for this present voyage —— ——, or whoever else shall go for master in the said ship, or by whatsoever other name or names the said ship or master thereof is or shall be named or called, beginning the adventure upon
162 the said goods and merchandises from the loading thereof aboard the said ship.

Warranted not to enter the Baltic, Black, or White seas and not to proceed to British North America (Halifax excepted), and so shall continue and endure, during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever shall be arrived at —— upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever in the course of her said voyage for all necessary purposes without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concern the assured, by agreement between the assured and the said company in this policy, are and shall be rated and valued at—

On the hull and materials, etc., value----------	£24,000
" " machinery and boiler " ----------	10,000
	£34,000

In the event of any claim for loss or damage arising upon this policy, the same to be adjusted and paid by ——

In case of damage during the voyage the agents for the said company at the port of loading or discharge, or their constituted surveyor, must be applied to for survey, and no claim will be admitted without their certificate.

Average recoverable on each valuation separately or on the whole, and in the event of claim no one-third new for old to be deducted. General average as per foreign statement, if so made up.

To return 10/8 per cent. for every 30 consecutive days the vessel may be in port or in dock during such time being at the risk
163 of the underwriters, and 11/8 per cent. for every 30 unexpired days if cancelled and arrival.

Touching the adventures and perils which the said company are contented to bear and do take upon them in this voyage; they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at

sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise, or ship, &c., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defense, safeguard, and recovery of the said goods and merchandise, or ship, &c., or any part thereof, without prejudice to this insurance, the charges whereof the said company will bear to an amount not exceeding the sum above insured, or the proportion which that sum bears to the real value of the subject-matter of this insurance; and the acts of the insured or insurer in recovering, saving, or preserving the property insured shall not be considered a waiver or acceptance of abandonment. And further, it is agreed by the said company that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard street, or in the Royal Exchange, or elsewhere in London. And so the said company are contented, and hereby do bind their real and personal estate, capital stock, and funds to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for this assurance by the assured at and after the rate of seven guineas per cent.

164 *Collision Clause.*

Recommended by the committee for managing the affairs of Lloyd's, after communication with the "Liverpool Underwriters' Association" and the "Salvage Association."

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of eight pounds per ton on her registered tonnage, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, calculated at the rate of eight pounds per ton, or if the value hereby declared amounts to a larger sum, then to such declared value, and in cases where the liability of the ship has been contested with our consent in writing we will also pay a like proportion of three-fourth parts of the costs thereby incurred or paid; provided, also, that this clause shall in no case extend to any sum which the insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals for any cause whatsoever.

In the event of any claim for loss or damage arising upon this policy the same to be adjusted and paid by ——.

In case of damage during the voyage the

agents for the said company at the port of loading or discharge, or their constituted surveyor, must be applied to for survey, and no claim will be admitted without their certificate.

N. B.—Corn, fish, salt, saltpetre, fruit, flour, seed are warranted free from average unless general, or the ship be stranded, sunk, or burnt. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent. Wool and all other goods, also the ship and freight, are warranted free from average under three pounds per cent. unless general or the ship be stranded, sunk, or
165 burnt. Profits or commissions are warranted free from all average, free from claim for leakage or breakage.

Warranted free from capture and seizure and detention, and all the consequences thereof, or of any attempt thereat.

In witness whereof, and that the said company are content with this assurance for the sum of five hundred pounds, the undersigned, Alex. Maclean & Co., being duly authorized by the directors of the said company, and on behalf of the said company, have hereunto set their hands, in London, this nineteenth day of May, one thousand eight hundred and seventy-five.

Per pro THE MERCANTILE MARINE AND FIRE INSURANCE COMPANY OF SOUTH AUSTRALIA.

(Signed) ALEX. MACLEAN & CO.,
Agents in London.

Examined: H. M.

EXHIBIT —.

£800.

Be it known that John Jupe, or as agent, as well in his own name as for and in the names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from and for and during the space of twelve callendar months, commencing on the 24th day of May, 1875, and ending on the 23d day of May, 1876, both days inclusive,
in port and at sea, in docks and on ways, at all times and
166 upon all occasions whatsoever, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the Great Western (S.), whereof is master, under God, for this present voyage —, or whosoever else shall go for master in the said ship, or by whatsoever name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, upon the said ship, &c., as above, with leave to tow, to be towed, and to assist vessels in all situations, and to sail with or without pilots, and so shall continue and endure during her abode there upon the said ship, &c.

And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever shall be ar-

rived at —, as above upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever for all purposes, without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at £800.

On Hull, materials, and furniture, &c., valued at	£24,000
Machinery and boilers	10,000
	£34,000

Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in this voyage; they are
167 of seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof. And in case of loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof, we, the assurers, will contribute, each one according to the rate and quantity of his sum herein assured. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance, by the assured, at and after the rate of seven guineas per cent. To return 11*s.* 8*d.* per cent. for every 30 consecutive days unexpired on cancellment and 10*s.* 8*d.* per cent. for every 30 consecutive days the ship may be in port, underwriters' risk still continuing.

Collision Clause.

Recommended by the committee for managing the affairs of Lloyd's, after communication with the "Liverpool Underwriters' Association" and the "Salvage Association."

168 And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and

the insured shall in consequence thereof become liable to pay, and shall pay, to the persons in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of eight pounds per ton on her registered tonnage, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, calculated at the rate of eight pounds per ton, or if the value hereby declared amounts to a larger sum, then to such declared value; and in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three-fourth parts of the costs thereby incurred or paid; provided, also, that this clause shall in no case extend to any sum which the insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals for any cause whatsoever.

In witness whereof, we, the assurers, have subscribed our names and sums assured, in London, 22 May, 1875.

N. B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded.

Running down clause attached. Warranted free from capture, seizure, and detention, and the consequences of any attempt thereat.

169 Average payable on each valuation as if separately insured or on the whole. General average payable according to foreign statement, if so made up. In the event of claim under this policy no thirds off new for old to be deducted; warranted not to proceed to the Baltic, Black, or White seas or British North America, Halifax excepted.

£800, Hartley's Association.

(Original policy missing.)

EXHIBIT —.

£3,000.

Be it known that John Jupe, or as agent, as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall, appertain, in part or in all, doth make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from, say, for and during the space of twelve calendar months, commencing at noon of the twenty-fourth day of May, 1875, and ending at noon of the twenty-fourth day of May, 1876, as employment may offer, in port and at sea, in docks and on ways, at all times and places, and on all services; upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the "Great

Western" (S.), whereof is master, under God, for this present voyage, ——— or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called, beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship, as above, say, on hull and materials, &c., machinery and boilers, &c. Average on each valuation payable separately or on the whole, including collision clause, —— upon the said ship,
170 &c., and so shall continue and endure during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever shall be arrived at as above, general average payable as per foreign statement, if required. In event of claim no one-third new for old to be deducted upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same be there discharged and safely landed; and it shall be lawful for the said ship, &c., in this voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, with leave to sail with or without pilots, and to tow and assist vessels in all situations, and to be towed, without prejudice to this insurance; the said ship, &c., goods, and merchandizes, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at—

Hull, &c.	£24,000
Machinery, &c.	10,000
	£34,000

Touching the adventures and perils which we, the assurers, are contented to bear, and do take, upon us in this voyage—they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of master and mariners, and all other perils, losses, and misfortunes that have, or shall have come, to the hurt, detriment, or damage of the said goods and merchandize and ship, &c., or any part thereof; and in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns to sue, labour, and travel for, in, and about
171 the defence, safeguard, and recovery of the said goods and merchandizes and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute, each one according to the rate and quantity of his sum herein assured. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and

goods, to the assured, their executors, administrators, and assigns for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured at and after the rate of six and one-half guineas per cent. To return 9*s.* 9*d.* per cent. for every period of thirty consecutive days laid up in port or in dock, during such periods being at the risk of underwriters, and 10*s.* 10*d.* per cent. for every period of thirty uncommenced days if policy be cancelled and arrived.

In witness whereof, we, the assurers, have subscribed our names and sums assured, in Glasgow, 13 May, 1875.

N. B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average, under five pounds per cent.; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded.

Warranted not to enter the Baltic, Black, or White seas; not to proceed to British North America, Halifax excepted.

Warranted free from capture, seizure, detention, and all consequences of hostilities.

172 And we further agree that if the ship hereby assured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof be found liable to pay, and pay any sums not exceeding the value of the ship hereby assured, in respect of injury to such other ship or vessel itself, or to the goods or effects on board thereof, or for loss of freight then being earned by such other ship or vessel, we will severally pay the assured such proportion of three-fourth parts of said sums as our respective subscriptions hereto bear to the value of the ship hereby assured.

GLASGOW, *June 28th*, 1875.

The risk under this policy is now declared to commence and date from 24th May, 1875, ending 23d May, 1876, both days inclusive.

Walter Birrell:

A. Lyle, one hundred pounds.
A. Lyle, Jr., one hundred pounds.
A. P. Lyle, one hundred pounds.
C. Lyle, one hundred pounds.
W. P. Lyle, one hundred pounds.

Thomas Low, for—

J. J. Wingate, fifty pounds.
J. A. Wylie, fifty pounds.
H. H. Galloway, fifty pounds.
A. Maxwell, fifty pounds.
Rob't Frazer, fifty pounds.
Thos. Low, fifty pounds.
A. T. Arrol, fifty pounds.
G. S. MacLethun, fifty pounds.
M. G. Wilson, fifty pounds.
P. Walker, fifty pounds.

£500.

Joseph Murison, for—
S. Thomson, fifty pounds.
173 J. Rose, fifty pounds.
T. Reid, fifty pounds.
A. Reitul, fifty pounds.
P. Dougall, fifty pounds.
A. Dennistown, fifty pounds.
R. A. Thomson, fifty pounds.
A. J. Adderley, fifty pounds.
T. D. Findlay, fifty pounds.
R. Rintul, Jr., fifty pounds.
G. Thomson, fifty pounds.
R. Robinson, fifty pounds.
W. Jeffrey, fifty pounds.
J. Bamatyne, fifty pounds.
J. Alexander, fifty pounds.
N. Bamatyne, fifty pounds.
T. Corbett, fifty pounds.
A. G. Corbett, fifty pounds.
W. Allison, fifty pounds.
J. Findlay, fifty pounds.
R. Kidston, fifty pounds.
C. B. H. Rethwisch, fifty pounds.
J. Murison (s), fifty pounds.
A. W. Singleton, fifty pounds.
J. E. Dunn, fifty pounds.
D. McBrayne, fifty pounds.
D. Greig, fifty pounds.
W. G. Harvey, fifty pounds.
A. Watt, fifty pounds.
A. Greenless, fifty pounds.
J. Murison (s), fifty pounds.
J. S. Thomson, fifty pounds.
James Reid, fifty pounds.
J. Parker, fifty pounds.
J. E. Swan, fifty pounds.
W. R. Crombie, fifty pounds.
F. G. Swan, fifty pounds.
John Reid, fifty pounds.
H. A. Swan, fifty pounds.
J. Athya, fifty pounds.

174 EXHIBIT —.

£15,700.

Be it known that John Jupe, or as agent, as well in his own name, as for and in the name and names of all and every other person or persons, to whom the same doth, may, or shall appertain, in part, or in all, doth make assurance, and cause himself and them and every

of them to be insured, lost or not lost, at and from, say for and during the space of twelve calendar months, commencing on the twenty-sixth day of July, 1875, and ending on the twenty-fifth day of July, 1876, both days inclusive, as employment may offer in port and at sea, in docks and on ways, at all times and places, and on all services. Upon any kinds of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the "Great Western" (S.), whereof is master, under God, for this present voyage, —— or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called, beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship, upon the said ship, &c., as above.

Say on hull and materials, &c., machinery and boilers, &c., average on each valuation payable separately or on the whole. Including collision clause, and so shall continue and endure during her abode there, upon the said ship, &c. And further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandise whatsoever shall be arrived at as above, general average payable as per foreign statement if required upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises until the same be there discharged and safely landed. And it shall be lawful for the
175 said ship, &c., in this voyage to proceed and sail to, and stay at any ports or places whatsoever, or wheresoever, with leave to sail with or without pilots, and to tow and assist vessels in all situations, and to be towed without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at

Hull, &c.	£24,000
Machinery	10,000
	£34,000

Touching the adventures and perils which we, the assurers, are contended to bear, and to take upon us in this voyage; they are of seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, taking at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever; barratry of the masters and mariners, and of all other perils, losses, and misfortunes, that have, or shall come to the hurt, detriment or damage of the said goods and merchandises and ships, &c., or any part thereof. And in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labor, and travel for, in and about the defense, safeguard, and recovery of the said goods and merchandise and ships, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute, each one according to the rate and quantity of his sum herein

assured. And it is agreed by us, the insurers, that this writing of policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind
176 ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance, by the assured, at and after the rate of six and one-half guineas per cent. To return 9*s.* 9*d.* per cent. for every period of thirty consecutive days laid up in port or in dock during such period, being at risk of underwriters, and 10*s.* 10*d.* per cent. for every period of thirty uncommenced days, if policy be cancelled and arrival.

And we further agree that if the ship hereby assured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof be found liable to pay, and — pay, any sums, not exeeding the value of the ship hereby assured in respect of injury, to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel, we will severally pay the assured such proportion of three-fourths parts of said sums as our respective subscriptions hereto bear to the value of the ship hereby assured.

In witness whereof, we, the assurers, have subscribed our names and sums assured in Glasgow, 24 July, 1875.

N. B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general or the ship be stranded.

Warranted not to enter the Baltic, Black, or White seas, nor to proceed to British North America, Halifax excepted. War-
177 ranted free from capture, seizure, and detentions, and all consequences of hostilities.

Walter Burrell for—

Walter Berrie, one hundred pound-.
James Wingate, one hundred pounds.
H. McCulloch, seventy-five pounds.
A. G. Robinson, fifty pounds.
M. G. Gibson, seventy-five pounds.
W. Malcolmson, seventy-five pounds.
F. Malcolmson, seventy-five pounds.
J. P. Kidston, seventy-five pounds.
G. I. Kidston, seventy-five pounds.
L. Potter, seventy-five pounds.
A. Mitchell, seventy-five pounds.
I. A. Burrell, seventy-five pounds.
W. Ferrier Kerr, seventy-five pounds.

W. Kidston, seventy-five pounds.
P. Rintoul, one hundred pounds.
I. Wingate (s), seventy-five pounds.
W. Burrell (s), seventy-five pounds.
G. Brymner, seventy-five pounds.
H. I. Watson, seventy-five pounds.
T. H. Watson, seventy-five pounds.
R. Curle, one hundred pounds.
R. R. Grout, seventy-five pounds.
A. Kidd, seventy-five pounds.
R. G. Somerville, one hundred pounds.
I. Arthur, one hundred pounds.
J. Aieken, one hundred pounds.
J. Gibburn, one hundred pounds.
G. McFarlane, seventy-five pounds.
I. A. Mapier, seventy-five pounds.
J. Wilson, seventy-five pounds.
A. McLean, one hundred pounds.
A. Rentoul, Jr., one hundred pounds.
J. Steel, one hundred pounds.
R. H Steel, one hundred pounds.
J. D. McIntyre, one hundred pounds.
A. M. Mitchell, seventy-five pounds.
178 H. H. Burrell, seventy-five pounds.
J. Hendry, seventy-five pounds.
A. Furguson, seventy-five pounds.
W. Letham, seventy-five pounds.
A. R. Orr, seventy-five pounds.
J. M. Hutcheson, seventy-five pounds.
R. Watt, seventy-five pounds.
G. R. Wilson, seventy-five pounds.
R. L. Alston, seventy-five pounds.
J. Ferguson, seventy-five pounds.
A. A. Laird, fifty pounds.
J. P. Kidston (s), one hundred pounds.
B. W. Burrell, seventy-five pounds.
W. B. Britgate, seventy-five pounds.

£4125.

Geo. Duck for—

J. J. Muirhead, seventy-five pounds.
Self, seventy-five pounds.
R. Gillan, seventy-five pounds.
C. M. E. Schmitz, seventy-five pounds.
R. Henderson, seventy-five pounds.
J. Hendrie, seventy-five pounds.
D. McDonald, seventy-five pounds.
John Henderson, seventy-five pounds.

£600.

William Burrell for—

W. Burrell, one hundred pounds.

D. McCowen, one hundred pounds.
A. Smith, one hundred pounds.
F. R. Read, seventy-five pounds.
R. B. Brown, seventy-five pounds.
R. Young, seventy-five pounds.
J. B. Kidston, seventy-five pounds.
R. Ker, seventy-five pounds.
W. Ker, seventy-five pounds.
H. Bolton, seventy-five pounds.
J. R. Reid, seventy-five pounds.
D. McCowen (3), one hundred pounds.
179 J. G. Smith, one hundred pounds.
H. Watson, seventy-five pounds.
W. H. Bolton, seventy-five pounds.
J. McCredie, seventy-five pounds.
W. A. Arrol, seventy-five pounds.
J. H. Carmichael, seventy-five pounds.
H. Hunter, seventy-five pounds.
J. Young, Jr., seventy-five pounds.
R. Little, seventy-five pounds.
R. Shankland, seventy-five pounds.
J. Roxburgh, seventy-five pounds.
G. W. Clark, seventy-five pounds.
A. D. Lennon, seventy-five pounds.
J. McClure, seventy-five pounds.
H. Boyd, seventy-five pounds.
A. Arrol, seventy-five pounds.
W. L. BacBrayne, fifty pounds.
J. B. Sheriff, seventy-five pounds.
J. Kidston, fifty pounds.
T. Carmichael, seventy-five pounds.
T. Prentice, seventy-five pounds.
J. Black, seventy-five pounds.
J. Clark, fifty pounds.
G. Yamger, seventy-five pounds.
J. Morton, fifty pounds.
T. Skinner, fifty pounds.
L. Gow, fifty pounds.
J. McGregor, fifty pounds.
J. R. Ray, fifty pounds.
W. E. Borrell, fifty pounds.
D. McCaven, Jr., seventy-five pounds.

£3,200.

John P. Paton for—

J. Cowan, one hundred pounds.
C. Cowan, one hundred pounds.
W. Maclean, one hundred pounds.
J. P. Paton, fifty pounds.
J. Knox, fifty pounds.
J. D. Berrills, one hundred pounds.

180 W. P. Ker, one hundred pounds.
J. R. Ker, fifty pounds.
D. Crawford, fifty pounds.
G. G. Boirrell, fifty pounds.
£750.

Thomas Low for—

John H. Watt, seventy-five pounds.
John Wilson, seventy-five pounds.
W. Houston, seventy-five pounds.
Hugh Watt, seventy-five pounds.
Wm. Wylie, seventy-five pounds.
A. A. Ferguson, seventy-five pounds.
R. Robin, seventy-five pounds.
W. MacLellan, seventy-five pounds.
Wm. Walls, seventy-five pounds.
Wm. Wyllie, Jr., seventy-five pounds.
R. Robin (s), seventy-five pounds.
Jas. Scott, seventy-five pounds.
Jas. A. Steel, seventy-five pounds.
R. Robin (s), seventy-five pounds.
R. Osborne, seventy-five pounds.
John Wylie, seventy-five pounds.
G. M. Blair, seventy-five pounds.
H. Miller, seventy-five pounds.
Thos. Steel, seventy-five pounds.
Henry Heps, seventy-five pounds.
Jas. Wilson, seventy-five pounds.
Al. Blair, seventy-five pounds.
H. Alexander, seventy-five pounds.
J. L. White, fifty pounds.
G. H. Pagan, fifty pounds.
Robt. Spiers, fifty pounds.
Jas. Blair, fifty pounds.
John Heys, fifty pounds.
H. E. Alexander, fifty pounds.
J. L Mackie, fifty pounds.
John Brown, fifty pounds.
T. Wharrie, fifty pounds.
£2,250.

181 R. Bennett Browne for—

R. B. Browne, seventy-five pounds.
W. Easton, seventy-five pounds.
H. L. Seligman, seventy-five pounds.
J. Lemmant, seventy-five pounds.
W. Young, seventy-five pounds.
W. Stirling, seventy-five pounds.
A. Barmatyne, seventy-five pounds.
W. Alston, seventy-five pounds.
A. Turnbull, seventy-five pounds.

G. Lamb, seventy-five pounds.
J. S. Maxwell, fifty pounds.
C. H. Seligman, fifty pounds.
Thos. Maxwell, fifty pounds.
G. W. Rainey, fifty pounds.
R. Knox, Jr., fifty pounds.
W. Jameson, fifty pounds.
S. Macphail, fifty pounds.
J. Craikshank, fifty pounds.
G. Martin, fifty pounds.
John Crum, fifty pounds.
T. Watson, fifty pounds.
G. Watson, fifty pounds.
R. Mcwharrie, fifty pounds.
G. B. Foster, fifty pounds.
A. Clapperton, fifty pounds.—£1,500.

W. J. Dickie for—

A. Thompson, twenty-five pounds.
G. N. Gray, twenty-five pounds.
J. Austine, twenty-five pounds.
W. MacLellan, Jr., twenty-five pounds.
D. MacLellan, twenty-five pounds.
G. M. Blair, twenty-five pounds.
M. Thomson, twenty-five pounds.
G. A. Thomson, twenty-five pounds.
J. Thomson, twenty-five pounds.
J. D. Thomson, twenty-five pounds.
J. Watson, twenty-five pounds.
182 J. Watson, Jr., twenty-five pounds.
J. Bunten, twenty-five pounds.
J. Menzies, twenty-five pounds.
J. Wright, twenty-five pounds.
H. Kirkwood, twenty-five pounds.
J. Bishop, twenty-five pounds.
S. F. Simpson, twenty-five pounds.
G. Hutchison, twenty-five pounds.
W. S. Steel, twenty-five pounds.
J. McMillan, twenty pounds.
J. McMillan, Jr., twenty pounds.
R. McMillan, twenty pounds.
W. G. Wright, twenty pounds.
C. Connell, twenty pounds.
A. Melville, twenty pounds.
J. R. Menzies, twenty pounds.
J. R. Thomson, twenty pounds.
G. P. Thomson, twenty pounds.
J. Andersen, twenty pounds.—£700.

Joseph J. Morrison for—

S. Thomson, twenty-five pounds.

J. Rose, twenty-five pounds.
T. Reid, twenty-five pounds.
P. Dorgale, twenty-five pounds.
A. Rintoul, twenty-five pounds.
A. Dennistoun, twenty-five pounds.
R. A. Thomson, twenty-five pounds.
A. J. Adderley, twenty-five pounds.
D. T. Findlay, twenty-five pounds.
R. Rintoul, Jr., twenty-five pounds.
G. Thomson, twenty-five pounds.
R. Robinson, twenty-five pounds.
W. Jeffrey, twenty-five pounds.
J. Barmatyne, twenty-five pounds.
J. Alexander, twenty-five pounds.
N. Barmatyne, twenty-five pounds.
J. Corbett, twenty-five pounds.
A. G. Corbett, twenty-five pounds.
W. Allison, twenty-five pounds.
183 J. Findley, twenty-five pounds.
R. Kidstone, twenty-five pounds.
C. B. H. Rethwisch, twenty-five pounds.
J. Morrison, twenty-five pounds.
A. W. Singleton, twenty-five pounds.
J. E. Dunn, twenty-five pounds.
D. WcBryne, twenty-five pounds.
D. Greig, twenty-five pounds.
W. G. Harvey, twenty-five pounds.
W. Watt, twenty-five pounds.
A. Greenless, twenty-five pounds.
J. Morrison (s), twenty-five pounds.
A. Dennistoun (s), twenty-five pounds.
H. Thomson, twenty-five pounds.
J. Reed, twenty-five pounds.
J. Parker, twenty-five pounds.
W. R. Crombie, twenty-five pounds.
John Reid, twenty-five pounds.
H. A. Swan, twenty-five pounds.
J. Athya, twenty-five pounds.
A. Thomson, twenty-five pounds.
J. Darling, twenty-five pounds.

£1,075.

J. B. MacBrayne for—

Peter Clouston, fifty pounds.
J. B. MacBrayne, fifty pounds.
J. Alexander, fifty pounds.
A. Russell, fifty pounds.
Jas. Raeburn, fifty pounds.
Alex. Ewing, fifty pounds.
Rob't Barclay, fifty pounds.
John Thomson, fifty pounds.

H. B. Price, fifty pounds.
Jas. Thomson, fifty pounds.
John Orr Ewing, fifty pounds.
Wm. Millar, fifty pounds.
J. King, fifty pounds.
J. Reid, fifty pounds.
A. Parker, fifty pounds.
R. Rintoul, fifty pounds.
184 Wm. Just, fifty pounds.
H. Robertson, fifty pounds.
J's Readman, fifty pounds.
Rob't Steel, fifty pounds.
Rob't Steel, Jr., fifty pounds.
J. P. Kidston, fifty pounds.
R. Rintoul, fifty pounds.
Lawe Robertson, Jr., fifty pounds.
Jas. Brown, fifty pounds.
Chas. Duncan, fifty pounds.
Thos. Bromlie, fifty pounds.
Geo. Lammie, twenty-five pounds.
Rob't Strang, twenty-five pounds.
H. Reddie, fifty pounds.
Wm. Russel, twenty-five pounds.
Peter C. Bullock, twenty-five pounds.

£1,500.

EXHIBIT.

£1,000.

Be it known that John Jupe, or as agent, as well in his own name as for and in the name and names of all and every other person or persons in whom the same doth, may, or shall appertain, in part, or in all, doth make assurance, and cause himself and them, and every of them, to be insured, lost or not, at and from ———. And for and during the space of twelve calendar months, commencing on the 19th day of February, 1876, and ending on the 18th day of February, 1877, both days inclusive, in port and at sea, in docks and on ways, at all times and upon all occasions whatsoever. With leave to tow, to be towed, and to assist vessels in all situations, and to sail with or without a pilot. Upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship
185 or vessel called the "Great Western" (S.), whereof is master, under God, for this present voyage —, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship, as above, general average, payable according to foreign statement if so made up, upon the said ship, &c., and so shall continue and endure during her abode there upon the said ship, &c.

And further, until the said ship, with all her ordnance, tackle,

apparel, &c., and goods and merchandise whatsoever, shall be arrived at as above, including all risk incidental to steam navigation upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, for all purposes, collision and average clauses attached, without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at £1,000.

On hull, materials, and furniture, &c., valued at	£24,000
Machinery and boiler, &c.	10,000
	£34,000

So valued.

Warranted free from capture, seizure, and detention, and the consequences of any attempt thereof.

Touching the adventures and perils which we, the assurers, are contented to bear and to take upon us in this voyage, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves,
186 jettisons, letters of mart and counter-mart, surprisals, taking at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever; barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defense, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard street or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of seven guineas per cent. To return 11*s.* 8*d.* per cent. for every 30 consecutive days the vessel may be in port, underwriters' risk still continuing; and 11*s.* 8*d.* per cent. for every 30 consecutive days unexpired or cancelment.

Average Clauses.

Steamers up to one year old: In case of average no thirds to be deducted except off painting or coating of vessel's bottom.

Up to three years old: In case of average no thirds to be deducted except of boilers, woodwork, sails, ropes, &c., and painting or coating of vessel's bottom.

187 Up to six years old: In case of average, one-sixth to be deducted off repairs to hull and machinery, and one-third off boilers, woodwork, sails, ropes, &c., and painting or coating of vessel's bottom.

No painting or coating of vessel's bottom to be allowed if the same has not been painted within six months previous to average.

Collision Clause.

Recommended by the committee for managing the affairs of Lloyds, after communication with the "Liverpool Underwriters' Association" and the "Salvage Association."

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of eight pounds per ton on her registered tonnage, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, calculated at the rate of eight pounds per ton, or, if the value hereby declared amounts to a larger sum, then to such declared value; and, in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three fourth parts of the costs thereby incurred or paid; provided, also, that this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of loss of life or personal injury to individuals, for any cause whatsoever.

188 In witness whereof, we, the assurers, have subscribed our names and sums assured in London, 16 Feb'y, 1876.

N. B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent.; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded. Warranted not to proceed to the Baltic, Black, or White Seas, or British North America, (Halifax excepted,) nor to any port in the Gulf of Mexico or River St. Lawrence, nor through the Suez Canal.

£100, E. Saunders,
£100, I. Crosfield,
£100, T. W. Stephens,
} per H. Crosfield, one hund. pds., 16 Feb'y 1876.

£50, I. Birchoff,
£50, A. Berwick,
£50, Wm. Kessler,
£50, Geo. Kissel,
} per C. Blogg, fifty pds., 16 Feb'y, 1876.
£100, A. T. Burrows, one hundred pds., 16 Feb'y, 1876.
£150, W. H. Budgett, per. J. Rawlins, one hd. and fifty pds., 16 Feb'y, 1876.
£100, W. Varmer, } per J. Rawlins, one hd. pds. each, 16 Feb'y,
£100, Hy. Rawlins, } 1876.
£50, I. C. Ambrede, per. D. W. Earle, fifty pds., 16 Feb'y, 1876.

189 And inasmuch as the said several matters produced and given in evidence on the trial in the said circuit court, and by the counsel for said libellants objected and insisted on, and the said exceptions do not otherwise appear, the counsel for said libellants has prepared and caused this bill of exceptions to be settled as a record thereof, according to the form and statute in such case made and provided and the course and practice of the court, and to be signed and ordered on file by the judge.

SAM'L BLATCHFORD,
Circuit Judge.

We have compared the foregoing with the proposed bill of exceptions and amendments as settled and believe the same to be correctly engrossed.

FOSTER & THOMSON.

Endorsed: Bill of exceptions. Filed August 11, 1883.

190 Circuit Court of the United States for the Eastern District of New York.

JENS THOMMESSEN and JULIUS SMITH, Libellants,
against
MARK WHITWILL, impleaded with JOHN DOE, Respondent.

Please to take notice that the libellants above named, Jens Thommessen and Julius Smith, appeal to the Supreme Court of the United States from so much of the final decree of the circuit court of the United States for the eastern district of New York, entered in the above-entitled action on the third day of August, 1883, as reverses the decree of the district court herein instead of affirming the same, and from so much of said decree of the circuit court as limits
191 the liability of the respondent, Mark Whitwill, to an amount less than the damage sustained by the libellants by reason of the collision in the pleadings mentioned, and from so much of said decree as limits the liability of the respondent to the value of the steamship as reduced by the standing while proceeding on her voyage after recovery from the collision in the pleading mentioned, and from so much of said decree in the adjudication of the liability of the respondent to be limited to the value of his interest in the steamer in the condition in which she and the remnants of her were after her stranding and wreck, and that he is liable in this suit to

respond for such value as excludes in the ascertaining of such value the amount of the insurance effected on the steamship covering the diminution of the value and damages from the stranding
192 realized by her owners thereon, and from so much of said decree as awards costs against the libellants.

New York, August 4th, 1883.

JAS. K. HILL,
Proctor for Libellant.

To B. LINCOLN BENDICT, Esq.,
Clerk of the U. S. Cir. C't, East'n Dist. of N. Y.

FOSTER and THOMSON, Esq'rs,
Proctors for Respondents.

Endorsed: Notice of appeal. Filed August 11th, 1883.

193 Circuit Court of the United States for the Eastern District of New York.

JENS THOMMESSEN and JULIUS SMITH, Libellants & Appellants,
vs.
MARK WHITWILL, impl'd with JOHN DOE, Respondent.

To the Honorable the Supreme Court of the United States:

The appeal of Jens Thommessen and Julius Smith, owners of the Norwegian bark Daphne, libellants and appellants herein, respectfully showeth:

That on or about the 27th day of March, 1876, the libellants and appellants above named, on behalf of themselves and of the owners of the cargo laden on board said bark, exhibited their libel in the district court of the United States for the eastern district of New York against Mark Whitwill and John Doe in a cause of collision, civil and maritime, for the recovery of damages to the sum
194 of twenty thousand dollars, alleged to have been sustained by them to the bark Daphne by her collision with the steamship Great Western, owned by the above-named Mark Whitwill and John Doe, on the night of March 24, 1876; and upon the issuing of process against said respondents the steamship Cornwall was attached, and that thereafter the respondent Mark Whitwill appeared and bonded the steamship so attached, and entered into stipulations and filed his answer to said libel, in which he alleged that said collision occurred solely through the carelessness and negligence of those on said bark Daphne; that if the libellants' claim should be established against the respondent in said action the liability of said respondent would be limited to the amount or value of his interest in the said steamer Great Western and her freight upon the voyage during which such collision occurred, and that said respondent's interest in said steamer and freight was of no value whatever.

195 That afterwards, and on or about the 16th day of April, 1877, the said cause came on to be tried and heard before the Honorable Charles L. Benedict, judge of the said district court, upon the allegations and proofs adduced by the respective parties upon

the issues raised by the respondent in his said answer; that during such trial a motion was made and heard on the part of the respondent for leave to amend his answer by inserting at the end of the seventh article thereof the words, "and he hereby surrenders the same to the libellants," which motion said judge granted, subject to the objection of the libellants; that the said judge having advised upon the allegations and proofs adduced by the respective parties upon the issues raised by the respondent in his said answer as amended, did, on or about the 28th day of March, 1878, make an interlocutory decree, bearing date that day, that the libellants recover of the respondent their damages sustained by said collision, and referring it to a commissioner of said court to ascertain the amount thereof.

That afterwards, and on or about the 21st day of Febru-
196 ary, 1881, a final decree was made and pronounced therein by said district court by which, among other things, it was adjudged that the libellants recover from said respondent the sum of $21,917.85, being the amount of their damages sustained by said collision, with interest, together with their costs.

That thereafter said respondent, Mark Whitwill, appealed from such final decree to the circuit court of the United States for the eastern district of New York, and the said cause was removed therefrom into the said circuit court, and there tried anew, upon the 25th day of May, 1822, before the Honorable Samuel Blatchford, Associate Justice of the Supreme Court of the United States, sitting as circuit justice in the said circuit, upon the pleadings, depositions, testimony, and proofs taken in the district court, and the further proofs on the behalf of the respondent, Mark Whitwill, taken in said circuit court, and on certain proposed findings of fact and conclusions of law, submitted by the respective parties,
197 and such proceedings were had in the said circuit court; that afterwards the said justice filed certain findings of fact and conclusions of law, together with an opinion in writing, in which findings of fact said justice, among other things, found that the libellants sustained damages by said collision as allowed in said district court, and that the value of said steamship after said collision was from $140,000 to $150,000; that, by a cause in no way connected with said collision, said steamship subsequently stranded, and that an abandonment of said steamship was thereafter made to underwriters, who paid to the owners thereof the sum of £34,000, and that the value of said steamship after her stranding was $1,796.14, and as conclusions of law, on the facts as found by him, as follows:

"First. The steamer was wholly in fault for the collision, and the bark was not in fault.

"Second. The liability of the respondent on this suit is
198 limited to the value of his interest in the steamer in the condition in which she and the remnants of her were after her stranding and wreck, and he is liable in this suit to respond for such value, which, on the present proof, is the sum of $1,796.14, and for nothing more."

That exceptions were taken by the libellants, as contained in their bill of exceptions, as allowed by the said justice; and afterwards, and on the 3d day of August, 1883, a final decree was made and entered, wherein and whereby it was, among other things, decreed and adjudged that the liability of said respondent, Mark Whitwill, to the libellants in this cause is limited to the value of the respondent's interest in the steamship Great Western in the condition in which said vessel and the remnants of her were after her stranding and wreck, and that the libellants recover of said respondent the sum of $1,796.14, being the value of respondent's said interest in said steamship as aforesaid, together with interest thereon
199 from March 23d, 1876, amounting to $776.83, with the further sum of $762.62, the costs of said libellants in the district court aforesaid, making in all the sum of $3,335.59; and that the aforesaid decree of the district court, so far as it awarded to the libellants any sum in excess of said amount of $3,335.59, be in all things reversed, and that the respondent, Mark Whitwill, recover of the libellants his costs in said circuit court, amounting as taxed to the sum of $1,093.85.

And these libellants and appellants are advised and insist that the said decree is erroneous, inasmuch as the said decree of the district court should not have boen reversed, but should have been in all things confirmed, and that the liability of said respondent, Mark Whitwill, should not have been limited to an amount less than the damages sustained by the libellants by reason of said collision, and inasmuch as the said decree limits the liability of the respondent to to the value of the steamship, as reduced by the stranding
200 while proceeding on her voyage, after recovery from the collision in the pleadings mentioned, and for that in ascertaining the value, as reduced by the stranding, it excluded the amount of the insurance effected on the steamship, covering the diminution of value and damage from the stranding, which was realized by her owners thereon.

And these libellants and appellants hereby appeal to the Supreme Court of the United States from so much of the said decree of the circuit court as reverses the said decree of the district court, instead of affirming the same; and from so much of said decree of the circuit court as limits the liability of said respondent to an amount less than the damage sustained by the libellant by reason of said collision; and from so much of said decree as limits the liability of the respondent to the value of the steamship, as reduced by the stranding while proceeding on her voyage, after recovery from the
201 collision in the pleadings mentioned; and from so much of said decree, in the adjudication of the liability of the respondent, to be limited to the value of his interest in the steamer in the condition in which she and the remnants of her were after her stranding and wreck, and that he is liable in this suit so respond for such value as excludes in the ascertaining of such value the amount of the insurance effected on the steamship, covering the diminution of the value and damages from the stranding realized

by her owners thereon; and from so much of said decree as awards costs against said libellants.

And these libellants and appellants and appellants respectfully pray that said decree of said circuit court, and the pleadings, findings of fact, conclusions of law, the bill of exceptions, exhibits, and proceedings in said cause or matter may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause, and that the said
202 decree of the said circuit court may be reversed, and that a mandate may be issued to said circuit court, directing that the said decree be reversed, and that the decree of the district court be affirmed, or that such other decree may be made as to the said Supreme Court shall seem fit.

Dated New York, August 3d, 1883.

JAMES K. HILL,
Proctor for Libellants, Appellants.

The foregoing appeal is allowed.
August 8th, 1883. SAM'L BLATCHFORD,
Circuit Judge.

Endorsed: Petition of appeal. Filed August 11, 1883.

203 *Bond for Costs.*

Circuit Court of the United States of America for the Eastern District of New York in the Second Circuit.

JENS THOMMESSEN and JULIUS SMITH, Libellants and Appellants,
vs.
MARK WHITWILL, impleaded with JOHN DOE, Respondent.

Know all men by these presents, That we, Christian Tobias and Ehler Osterholt, are held and firmly bound unto the above-named Mark Whitwill in the sum of two thousand seven hundred dollars, to be paid to the said Mark Whitwill, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the third day of August, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas the above-named Jens Thommessen and Julius Smith have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the eastern district of New York.

Now, therefore, the condition of this obligation is such, that if the above-named Jens Thommessen and Julius Smith shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. TOBIAS.
EHLER OSTERHOLT.

Sealed and delivered, and taken and acknowledged, this 6th day of August, 1883, before me.

[L. S.]

CHAS. MURRAY,
Notary Public, Kings & N. Y. Co.

201 UNITED STATES OF AMERICA.
Southern District of New York,
City and County of New York, } *ss:*

C. Tobias and Ehler Osterholt, being duly sworn, depose and say, and each for himself says, that he is worth the sum of six thousand dollars over and above his just debts and liabilities.

EHLER OSTERHOLT.
C. TOBIAS.

Sworn to, this 6th day of August, A. D. 1883, before me.

CHAS. MURRAY,
Notary Public, Kings & N. Y. Co.

The foregoing bond is approved.
August 8th, 1883.

SAM'l BLATCHFORD,
Circuit Justice.

[Endorsed:] Vol. ——, page ——. U. S. circuit court. Jens Thommessen and Julius Smith *vs.* Mark Whitwill, impl'd with John Doe. Bond for costs on appeal. Jas. K. Hill, libellants' proctor, 45, 47 William St., New York city. Filed this 11th day of August, 1883. Sureties approved Aug., 1883. Foster & Thomson.

205 UNITED STATES OF AMERICA,
Eastern District of New York, } *ss:*

I, B. Lincoln Benedict, clerk of the United States circuit court for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to two hundred and four, inclusively, contain a true and complete transcript of the record and proceedings had in said court in the case of Jens Thommessen and Julius Smith, libellants and appellees, *vs.* Mark Whitwill, impleaded with John Doe, composing the firm of Mark Whitwill & Co., of Bristol, England, owners of the steamship "Great Western," respondent and appellant, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in said circuit, this 29th day of September, A. D. 1883, and of the Independence of the said United States the one hundred [and] eighth.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

206 By the Honorable Samuel Blatchford, Associate Justice of the Supreme Court of the United States.

To MARK WHITWILL, impleaded with JOHN DOE, respondent:

Whereas the libellants, Jens Thommessen and Julius Smith, have

lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the eastern district of New York, made in favor of you, the said Mark Whitwill, respondent, stating that the said decree is erroneous, and praying that the same be reversed, and have filed the security required by law:

Now, therefore, you are hereby cited to appear before the said Supreme Court, at the city of Washington, in the District of Columbia, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand the eighth day of August, in the year one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

SAM'L BLATCHFORD,
Circuit Justice.

207 [Endorsed:] Court of the United States. Jens Thommessen and Julius Smith, libellants and appellants, *against* Mark Whitwill, impleaded with John Doe, respondent. Citation. Jas. K. Hill, proctor for libellants & appellants. Service of copy of the within citation is hereby admitted. N. Y., September 4, 1883. Porter & Thomson.

Endorsed on cover: E. New York C. C. U. S. No. 636. Jens Thommessen and Julius Smith, owners of the Norwegian bark "Daphne," appellants, *vs.* Mark Whitwill. Filed 5th October, 1883.

118-520

OCT. 26. 1885
JAMES H. MCKENNEY,
CLERK

U. S. Supreme Court.

JENS THOMMESSEN AND JULIUS SMITH, OWNERS OF THE NORWEGIAN BARK "DAPHNE,"
Libellants and Appellants,

vs.

MARK WHITWILL,
Respondent and Appellee.

BRIEF AND POINTS OF THE APPELLANTS.

JAS. K. HILL, WING & SHOUDY,
Proctors for J. THOMMESSEN ET AL.,
Libellants and Appellants.

C. VAN SANTVOORD,
HARRINGTON PUTNAM,
Of Counsel.

U. S. Supreme Court.

JENS THOMMESSEN AND JULIUS SMITH, owners of the Norwegian Bark, "*Daphne*," Libellants and Appellants,

v.

MARK WHITWELL, Respondent and Appellee.

BRIEF AND POINTS OF THE APPELLANTS.

Statement of the Case.

I.—This is an appeal to the Supreme Court, by the above named libellants from a decree of the Circuit Court for the Eastern District of New York, which was made on an appeal to said Circuit Court by the above-named respondent from the decree of the District Court for the Eastern District of New York, which it reversed, making a new decree less favorable to the libellants.

Reference is made for their contents to the interlocutory decree of the District Court of 28th March, 1878, and the final decree of that Court of the 21st day of February, 1881, on pages of the printed Record, 23, 24.

To the decree of the Circuit Court, 3d August, 1883, on pages 32, 33.

To the findings of fact and conclusions of law by the presiding justice at the Circuit Court, dated and filed on or about 25th July, 1882, on pages 41 to 44.

There is a misprint in the statement of damages sustained by the libellant at $7,023.44; it should be $17,023.44. See the decree in the District Court, on p. 24 of the Record. Opinion of C. J., p. 55.

The word condition in *italics* in the next sentence should be collision.

And to the notice and petition of appeal of libellants to this Court for the grounds and extent of the appeal.

II.—The action in the District Court was a cause of damage brought by the libellants Jens Thommessen and Julius Smith, of Arendal, Norway, the owners of the bark *Daphne*, her tackle, &c., which, while on a voyage from Baltimore, Maryland, to Marseilles, France, with a cargo of crude petroleum oil, was, on the night of March 24th and 25th, 1876, run into by the British steamship *Great Western*, on a voyage from Gibraltar to New York, against Mark Whitwell and others, of Bristol, England, the owners of the steamship.

The collision was on the high seas, one hundred and seventy-five to one hundred and eighty miles from Sandy Hook, and about one hundred and fifty miles from the beach near Fire Island.

The libellants, as owners of the bark, in behalf of themselves and of the owners of the cargo, of which they were common carriers, filed a libel *in personam* in the United States District Court for the Eastern District of New York, on the 27th March, 1876, against Mark Whitwell and John

Doe, comprising the firm of Mark Whitwell & Co., of Bristol, England, owners of the steamship *Great Western*, in a cause of collision, civil and maritime, for the recovery of the damages to the bark, and the loss and damage to her cargo from the collision, caused as alleged, in the libel, wholly by the carelessness and negligence of those in charge of said steamship *Great Western*.

And in their libel they prayed that process, in due form of law, might issue against the respondents, and that they be compelled to appear and answer the allegations of the libel, and in case they cannot be found, that their goods and chattels and property to the amount sued for be attached, and that the respondents be compelled to pay the libellants' claim, with costs

Under process with clause of foreign attachment, the Marshal attached the steamship *Cornwall*, as property of the respondents, and thereafter on the 29th March, 1876, Foster & Thomson, proctors for respondents, Mark Whitwell put in a general appearance for him, and stipulations for costs in this suit in the sum of $250, conditioned that the respondent above-named and others shall pay all costs and expenses which shall be awarded against them by the final decree of this Court, or upon an appeal to the Appellate Court, and for value to the sum of $25,000, conditioned that if the stipulators shall at any time upon the interlocutory or final order or decree of said District Court, or of any Appellate Court; and upon notice of such order or decree to Foster & Thomson, Esqs., proctors for respondents, abide by and pay the money awarded by the final decree rendered by the Court or the Appellate Court, if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue, were entered into on the respondent's behalf, and thereupon the steamship *Cornwall* was released from the Marshal's custody upon payment of his fees.

See pages 3 to 6.

A motion noticed for 13th December, 1876, on behalf of the respondents for an order that the Court decline to en-

tertain jurisdiction of the action, and that the libel be dismissed, by reason of such refusal to entertain jurisdiction, was denied.

The papers on the motion from fol. 15, on p. 7, into p. 14.

Opinion of Benedict, *J.*, on the motion, pages 14, 17; reported 9 Ben., 113.

Decree, p. 17.

As the decision on this motion is not brought by appeal to this Court by respondent, the points presented and authorities cited on the part of libellants in opposition to the motion are here omitted.

III.—The respondent filed his answer 25th November, 1876, and in the seventh article claimed a limited liability, and raised an issue on the extent of it.

On the trial in the District Court April 19, 1877, the pleadings having been read, respondent's counsel moved to amend the answer by adding at the close of the seventh article the words: "and hereby surrenders the same to the libellants.

This proposed amendment was allowed by the District Judge, subject to objection.

As amended the seventh article reads as follows:

SEVENTH.—(November 25, 1876.) He alleges, upon information and belief, that if the matters alleged in said libel be true, and the libellants claim for damages resulting to said bark or her cargo or both, from the alleged collision shall be established herein against this respondent, the liability of this respondent therefor is limited to the amount or value of his interest in the said steamer *Great Western* and her freight upon the voyage during which said collision occurred, and this respondent's said interest in said steamer and freight is of no value whatever (April 19th, 1877).

And he hereby surrenders the same.

It appearing upon the proofs in the District Court (on which as to this the findings in the Circuit Court are predicated) that the value of the steamship at the time of the collision with the *Daphne*, whether ascertained by refer-

ence to her condition before the collision or to her condition after the collision, and before a subsequent stranding, not growing out of or connected with the collision was from $140,000 to $150,000, sums largely in excess of the damages claimed by the libellant.

And further, that after the collision, while prosecuting her voyage and before reaching New York the steamship was stranded and wrecked on the coast of Long Island, on the beach near Fire Island Lighthouse, on Long Island, at a distance off from the place of collision of about one hundred and fifty miles, from a cause in no way growing out of or connected with said collision, and not directly from any peril of the sea, but by the careless navigation and fault of the persons in charge of her; whereby she was greatly deteriorated and reduced in value to an amount less than the libellants' claim for damages.

The libellants' counsel contended that the extent of the ship owners' liability was to be determined by the limitation in the United States statute, and that in this action the limitation in that statute to an amount ascertained by reference to the value of the steamship and her freight pending at the time of the collision or when the cause of action accrued (such value in this case being largely in excess of the libellants' claim for damages from the collision, whether ascertained by reference to her condition before or as left by the collision), excluded any limitation to the value of the ship as reduced by the subsequent casualty to the ship.

The respondent's counsel contended that the United State statute was not applicable where both parties are foreigners, and the collision on the high seas out of the jurisdiction of the United States, and that the extent of the limitation was to be determined by the rule of the general maritime law. The Judge held that it was to be determined by the rule of the general maritime law; and he held upon French authorities cited that to meet the requirements of that law of an abandonment, that the tender of a surrender as in the amendment to the answer was sufficient, and was not too late in time provided the right to abandon had not been lost. The Judge, quoting from a book on the practice in French Maritime Courts, said:

"As to the form of surrender the law has made no provision. It may be made by declaration before a notary signified to the creditor, or by a simple notice sent by an officer (Exploit d'hussier), or even on the plea made by the owner to defeat the action constituted against him. (Des Capitaines, Maitres des Patrons by Eloy and Guinand, p. 722.)

The Judge found, however, a fatal difficulty for the defendants, viz.: that when he made this tender he had no interest in the vessel to abandon. The undisputed evidence being that in April 1, 1876, after the filing of the libel in this cause and before the filing of the answer, the vessel (there was no freight) was sold by the defendant and then passed into the possession and ownership of other parties.

See the opinion of the District Judge in the record, March 25, 1878.

After disposing of the question of claim to limited liability under the general maritime law as found in the French books, the District Judge pronounced for the libellants upon the pleadings and proofs, as in the decree of February 21st, 1881, that the libellants, Jens Thomessen and Julius Smith, do recover herein against the respondent, Mark Whitwell, the sum of seventeen thousand twenty-three dollars and forty-four cents ($17,023.44), with interest on fourteen thousand, three hundred and seventy-four dollars and forty-four cents ($14,374.44) from May 6, 1876, to date of this decree, amounting to four thousand one hundred and thirty-one dollars and seventy-nine cents ($4,131.79), and seven hundred and sixty-two $\frac{62}{100}$ dollars costs as taxed, making together the sum of twenty-one thousand nine hundred and seventeen $\frac{85}{100}$ dollars.

IV.—Exceptions on the Trial.

First.—On the trial in the Circuit Court, on the 25th May, 1882, on the appeal by the respondent from the decree of the District Court, the counsel for the libellants read the libel; the counsel for respondent, Mark Whitwell,

read his answer filed in the District Court November 25, 1876.

And upon said counsel proposing to read on the trial in the Circuit Court the amendment to the answer allowed against the objection of libellants' counsel by the District Judge on the trial in the District Court, by adding, at the close of the seventh article, the words, "and he hereby surrenders the same to the libellants," the libellants' counsel again objected that the same was unauthorized, inadmissible and irrelevant for the purpose proposed of limiting the liability of the respondents, and also for that, if otherwise admissible, it was not seasonably made.

The objections were overruled by the judge, and the answer was ordered to be so amended; and the libellants excepted to this his ruling and order, Bill of Exceptions, p. 34.

Second Exception.—The respondent, Mark Whitwell, on the trial in the District Court, April 19, 1877, tendered to the libellants in open Court a paper executed by said respondent by his duly authorized agent, and the execution of which was duly ratified by said respondent, of which the following was a copy, and asked the Court to note that fact, and put said paper in evidence, subject to objection then taken by libellants' counsel:

Know all men by these presents, that I, Mark Whitwell, of Bristol, England, *heretofore* part owner of the steamship *Great Western*, do hereby surrender to Jens Thommessen and Julius Smith, of Arendal, Norway, owners of the bark *Daphne*, all my interest in the said steamship *Great Western* and her freight, as of the date of March 25, 1876.

In witness whereof, I have hereto set my hand this 19th day of April, 1877.

MARK WHITWELL,
By W. D. MORGAN,
Agent.

In presence of
CHARLES F. WELLS.

City and County of New York, ss.:

On this 19th day of April, 1877, before me personally came William D. Morgan, to me known, and known to me to be the same person described in and who executed the foregoing instrument as the agent of Mark Whitwell, therein named, and to me known to be such agent; and he to me acknowledged that he executed such instrument, as and for the act and deed of the said Mark Whitwell.

CHARLES F. WELLS,
Notary Public,
New York.

The respondents' counsel offering to read this evidence on the trial in the Circuit Court, and again tendering the said paper in open Court to the libellants, the libellants' counsel objected thereto as inadmissible, insufficient and irrelevant for any purpose of limiting the liability of respondents, and also for that, if relevant for any such purpose, the same was not seasonably made.

The judge overruled the objection and allowed the same to be read in evidence, and the counsel for libellants excepted to his so ruling.

The libellants submitted proposed findings of fact and conclusions of law as set forth in the Bill of Exceptions (from fol. 73 on page 37 to fol. 80 on page 41).

And thereafter the judge, and on or about the 25th July, 1882, made and filed the following findings of fact and conclusions of law.

In this case I find the following facts:

The bark *Daphne*, of Arendal, Norway, where she was built, left Baltimore Maryland, in good condition on the 18th of March, 1876, with a cargo of crude petroleum in barrels, bound to Marseilles, France, and passed out to sea on the 20th of March. On the 25th of March, from 20 to 30 minutes after midnight the *Daphne* was run into by the British Steamship *Great Western* bound from Gibraltar to New York, with a cargo of merchandise.

The place of collision was on the high seas 175 to 180 miles from Sandy Hook, and about 150 miles from the beach near Fire Island Light-House on Long Island. The

weather at and before the time of the collision was fine. The night was dark, but there was no difficulty in seeing lights at a great distance on the water. The wind was about east-southeast. The course of the *Daphne* was between northeast and northeast half north. She was sailing by the wind on her starboard tack, and had the usual regulation lights, green on her starboard side, and red on her port side, properly placed and burning brightly, and was keeping a good lookout.

The white masthead light of the steamship was seen from the bark at about 11 o'clock P. M., at a distance off, as estimated of about 12 miles, and about 4 points on the bark's starboard, and weather bow, and afterwards the steamship's red light was seen from the bark.

From the time of the first observation by the bark of the white light of the steamer, the bark, with all her sails set except the main royal and gaff topsail, was kept on her course northeast to northeast half north, sailing by the wind, making about six miles an hour, and without any change of her course, by the action of her helm, until the steamer was coming into her, and was within a distance off of about two of her lengths, and angling a little from aft of the bark toward the bark's bow, as on a port helm when an order was given to the wheelsman of the bark to keep off, and the bark had fallen off a little when she was struck by the stem of the steamship aft of her fore-rigging on her starboard side, the steamship cutting into the starboard side of the bark down from the rail and into the beams, breaking the waterways and plank and doing other damage, which made it necessary for the bark to put back for repairs.

The steamship was on a course before the collision northwest by west, crossing that of the bark, and, without sails set, was making between seven and eight knots an hour.

The green light of the bark was seen from the steamship at a distance off of six or seven miles bearing west by south, seven (should be four) points on her port bow.

The steamship kept on her course without changing it until she was too close to allow her to go under the bark's stern, and then her helm was ported, hard-a-port, to bring

her around to the starboard, and leave the bark on her port hand, in which maneuver she struck the bark aft of her fore-rigging, as aforesaid, stem on, after an order was given to stop her engines and reverse full speed, as the bark was falling off.

The libellants sustained damages from the injuries to the bark by the collision, as allowed by the District Court in the sum of $17,023.44.

The value of the steamship at the time of the collision, whether ascertained by reference to her condition before the collision, or to her condition after the collision, and before her stranding was from $140,000 to $150,000. The libellants are and were at the time of the filing of the libel herein, and of said collision residents of Arendal, in Norway, and subjects of the Kingdom of Norway, and Sweden, and there domiciled, and owners of said bark. The respondent Mark Whitwell was at the same times a resident of Bristol, in England, and a subject of the United Kingdom of Great Britain and Ireland, and there domiciled, and one of the owners of the said steamship.

After the said collision and on the same 25th of March, whilst still on said voyage and before reaching New York the said steamship was stranded and wrecked on the southern coast of Long Island, from a cause in no way growing out of or connected with said collision, and not directly from any peril of the sea, or without the act of man mingling with it; but by the careless navigation and fault of the persons in charge of her. No freight is shown to have been received on said voyage.

The owners of the said steamship, on the 28th and 29th of March, 1876, duly made an abandonment of the said steamship to the various underwriters who had insured her.

Before and at the time of said stranding the said steamship was under insurance, effected by the owners thereof, to the amount of £34,000, which they realized from the insurance companies by the payment to them of that sum as for a total loss, after tender of an abandonment.

After said abandonment and on various dates down to the 12th of May, 1876, the wreck of the said steamship and the materials saved therefrom, were duly sold at

public auction for account of whom it might concern Such sale was duly and publicly advertised in the City of New York, but no notice of it was otherwise given to the libellants.

It was made for the account of the said underwriters, and was made pursuant to directions from the owners, and after paying the expenses of saving and selling the property it realized the sum of $1,796.14. On the 27th of March, 1876, the master of the said bark, acting as agent for the libellants, who were not then in this country, commenced this action in their name.

The respondent, Mark Whitwell, was not in this country. A process of foreign attachment against the property of the respondents was issued, under which the steamer *Cornwall* in which the respondent Whitwell had an interest, was attached and he appeared generally and answered in the cause. On the trial in the District Court, and also on the trial in this Court, his answer was ordered to be amended by adding at the close of the 7th article thereof the words, "and he hereby surrenders the same to the libellants."

On the trial in the District Court, and also on the trial in this Court, the counsel for the respondent Whitwell tendered to the other side in open court a paper, of which the following is a copy, and asked the Court to note the fact, and also put in evidence the said paper, subject to objection then made by the libellants' counsel:

Know all men by these presents, that I, Mark Whitwell, of Bristol, England, heretofore part owner of the steamship *Great Western*, do hereby surrender to Jens Thommessen and Julius Smith, of Arendal, Norway, owners of the bark *Daphne*, all my interest in the said steamship *Great Western* and her freight, as of the date of March 25, 1876.

In witness whereof, I have hereto set my hand, this 19th day of April, 1877.

MARK WHITWELL,
By W. D. Morgan, Agent.

In presence of
CHAS. F. WELLS,

City and County of New York, ss.:

On this 19th day of April, 1877, before me personally came William D. Morgan to me known, and known to be the same person described in and who executed the foregoing instrument, as the agent of Mark Whitwell therein named, and to me known to be such agent, and he to me acknowledged that he executed such instrument as and for the act and deed of the said Mark Whitwell.

CHARLES F. WELLS,
Notary Public, New York.

Such paper was executed by the duly authorized agent of the said Whitwell, and its execution was thereafter ratified by said Whitwell.

On the trial in this Court the counsel for the respondent Whitwell offered to produce a paper, to be signed by said Whitwell, by said Morgan, as his attorney, in all respects like the one above set forth, dated April 19, 1877, except containing a transfer to a trustee for the benefit of the libellants, under the provisions of section 4285 of the Revised Statutes of the United States, if the Court should be of opinion that such transfer to a trustee, and not a surrender to the libellant, is necessary, and asked that in such event the answer be amended accordingly.

On the foregoing facts I find the following conclusions of law:

FIRST.—The steamer was wholly in fault for the collision, and the bark was not in fault.

SECOND.—The liability of the respondent in the suit is limited to the value of his interest in the steamer in the condition in which she and the remnants of her were after her stranding and wreck, and he is liable in this suit to respond for such value, which, on present proof, is the sum of $1,796.14, and for nothing more.

SAMUEL BLATCHFORD,
Circuit Justice.

VI.—The findings of fact and conclusions of law of the Judge involve the following holdings :

1*st Holding.*—That upon the application of the act of Congress the respondent in the action against him for the recovery of damages from the collision caused by the sole fault of the steamship was not liable to the full extent of the damages in a case where the steamship while proceeding on her voyage was of a value, at the time of the collision, or, when the cause of action accrued ; whether ascertained by reference to her condition before collision, or thereafter, while proceeding on her voyage, was largely in excess of the damages claimed.

2*d Holding.*—That in the action for the recovery of damages from the collision caused by the sole fault of the steamship or the persons in charge of her, in a case where the steamship, while proceeding on her voyage, was of a value at the time of the collision, or when the cause of action accrued, whether ascertained by reference to her condition before the collision, or thereafter, while proceeding on her voyage, was largely in excess of the damages claimed, that the amount of the recovery is limited to the value as reduced by a subsequent independent disaster while proceeding on her voyage, after the collision, through the negligence and fault of the persons in charge of her navigation.

3*d Holding.*—That as involved in the next preceding, the time for the valuation of ship and pending freight to ascertain the limitation in an action against a ship owner under section 4283 of the United States Revised Statutes is uncertain and liable to suspension for an indefinite period, to the end of the voyage, it may be, or it may be only until a return of the offending ship to her port of departure to bring ashore the crew of the other ship before proceeding on her voyage, or until it shall be finally ascertained what is going to happen to the ship before she reaches the port of her destination.

4th Holding.—Finding the fact to be that the steamship was of the value, at the time of the collision, whether ascertained by reference to her condition before the collision or to her condition after the collision and before her stranding, from $140,000 to $150,000; and that after the collision and on same 25th March, while still on her voyage and before reaching New York, the said steamship was stranded and wrecked on the southern coast of Long Island. from a cause in no way growing out of or connected with such collision, and not directly from any peril of the sea or without the act of man mingling with it, but by the careless navigation and fault of the persons in charge of her, and that thereby the value of the steamship was reduced to the sum of $1,796.14; without any finding of any amount of damages for which the owners of the ship became liable to shippers and others by this stranding of the ship (which, indeed, it was not competent for him to take proofs of except in proceedings for an apportionment after the termination of the voyage), in taking the value of the steamship, as reduced by this stranding, as the limit of the recovery by the libellant. He holds that the owner of the steamship is entitled, as a creditor, to come into competition with the creditors of the steamship, to the full amount of the damage and loss to the ship by the stranding.

5th Holding.—That notwithstanding the fact found by the judge, that the owner of the steamship, on the 28th and 29th March, 1876, made an abandonment of the steamship to the various underwriters who had insured her, and that before and at the time of the stranding, the said steamship was under insurance, effected by the owners thereof, to the amount of £34,000, which they realized from the insurance companies by the payment of that sum as for a total loss, after tender of abandonment that the respondent claiming a reduction to the value of the ship, as reduced by the stranding, was under no obligation to bring in the insurance which covered the loss.

6th Holding.—On his finding as of fact that on the trial in the District Court, and also on the trial in this Court,

respondent's answer was ordered to be amended by adding at the close of the 7th article thereof the words, "and he hereby surrenders the same to the libellants."

That on the trial in the District Court, and also on the trial in this Court, the counsel for the respondent Whitwell tendered to the other side, in open Court, a paper, of which the following is a copy, and asked the Court to note the fact, and also put in evidence the said paper, subject to objection then made by the libellants' counsel:

Know all men by these presents that I, Mark Whitwell, of Bristol, England, *heretofore* part owner of the steamship *Great Western*, do hereby surrender to Jens Thommesson and Julius Smith, of Arendal, Norway, owners of the bark *Daphne*, all my interest in the said steamship *Great Western* and her freight, as of the date of March 25, 1876.

In witness whereof I have hereto set my hand, this 19th day of April, 1877.

MARK WHITWELL.
By W. D. MORGAN,
Agent.

In presence of
CHARLES F. WELLS.

City and County of New York, ss.:

On this 19th day of April, 1877, before me personally came William D. Morgan, to me known, and known to be the same person described in and who executed the foregoing instrument, as the agent of Mark Whitwell, therein named, and to me known to be such agent, and he to me acknowledged that he executed such instrument as and for the act and deed of the said Mark Whitwell.

CHARLES F. WELLS,
Notary Public,
New York.

Such paper was executed by the duly authorized agent of the said Whitwell, and its execution was thereafter ratified by said Whitwell.

On the trial in this Court the counsel for the respondent

Whitwell offered to produce a paper to be signed by said Whitwell, by said Morgan, as his attorney, in all respects like the one above set forth, dated April 19, 1877, except containing a transfer to a trustee for the benefit of the libellants, under the provision of section 4285 of the Revises Statutes of the United States, if the Court should be of opinion that such transfer to a trustee and not a surrender to the appellants, is necessary, and asked that in such event the answer be amended accordingly.

The findings of the judge on these last findings of fact involve a holding, that these performances were available and material to the respondent in limiting his responsibility.

Assignments of Error.

First Assignment of Error.—The holdings of the judge upon the application of the Act of Congress, upon the facts as found by him involved, in his limitation of the recovery by the libellants in their suit to the value of the respondents' interest in the steamer, in the condition in which she and the remnants of her were after her stranding and wreck, and that the respondents were liable in this suit to respond for such value, which, as found by him, was the sum of $1,796.14, and for nothing more, are in abrogation of the limitation provided in section 4283 of the U. S. Revised Statutes in its application to such suit; and of the system of limitations of the liability of shipowners as prescribed by that statute.

Second Assignment of Error.—Upon the findings of fact by the judge that the owners of the steamship on the 28th and 29th of March, 1876, made an abandonment of the steamship to the various underwriters, who had insured her, and that before and at the time of said stranding said steamship was under insurance, effected by the owners thereof, to the amount of £34,000, which they realized from the insurance companies by the payment to them of that sum as for a total loss, after tender of an abandonment, he was in error in holding that the respondents claiming a reduction to the value of the

steamship, as reduced by the stranding, were not under obligation to bring in the insurance which covered the loss, and in limiting the recovery to the value of the wreck, excluding the insurance.

THIRD ASSIGNMENT OF ERROR.—Upon the findings of fact, as stated above in the sixth (6) holding, involved in the judge's finding of fact, he was in error in not holding that the performances therein mentioned were unauthorized by any general maritime law which has been adopted by statute or usage in the United States (especially after a previous abandonment to the underwriters by which the owners had parted with all interest), as a rule of the maritime law, and that they were immaterial and unavailing and irrelevant for any purpose or any question of limitation of liability under such law.

And in not holding that, as between the Norwegian and British owners in the United States, the only law applicable to the case is the law of the forum; at least without proof that the laws of Norway and Great Britain on the question of the limited liability of shipowners are the same.

Argument and Citations of Statutes and Cases.

First.—By the common and general admiralty and maritime law of the United States the rule in cases of collision is that the party in fault must *suffer his own loss*, and compensate the other party for what loss he may sustain.

> 1 Parsons Ady. and M. Law (Ed. 1869), 525, citing the *Scioto*, Davies, 359; the *Woodrop Sims*, 2 Dods., 83; Reeves *v.* Ship *Constitution*, Gilpin, 574; the *Sappho*, 9 Jurist., p. 560, and other cases.

The first question to be considered is, how far the rule has been altered by the act of Congress.

The act entitled An Act to Limit the Liability of Shipowners, and for other purposes, passed March 3, 1851 (9th U. S. Statutes at Large, 635), was re-enacted in the U. S. Revised Statutes, June 22, 1874, in secs. 4281, 4282, 4283, 4284, 4285, 4286, with some changes in arrangement and in words.

The purpose of the act was to limit the liability of shipowners in actions against them for certain enumerated causes of action.

Sec. 4281 enacts that if any shipper of platina, gold, gold dust and other articles in the section mentioned shall lade the same as freight or baggage on any vessel without at the time of such lading giving to the master, clerk, agent or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner ; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered.

Sec. 4282. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in or put on board any such vessel by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

Sec. 4283. By this section it is enacted that the liability of the owner of any vessel for any embezzlement, loss or destruction by any person, of any property, goods or merchandize, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

This is a limitation in an action against the ship owner in which the parties are the plaintiffs seeking to recover damages for any of the causes of action in the section mentioned and the defendant, the ship owner.

The limitation in this section is not a limitation of the liability of the owner of any vessel, for any and all of the several causes of action therein described, but a limitation of his liability only for any one of the several causes for which an action is brought against him.

The time of the valuation of the vessel and freight pending for the purpose of determining the extent of the limitation in this section, is the time of the loss or of the accruing of the cause of action.

The words *pending freight* in the description of the subject to be valued is freight previously contracted for; it is not freight lost nor freight earned. As freight contracted, it is capable of being valued, and in every day's experience is covered by insurance.

The vessel and her freight pending is a description of the vessel proceeding on her voyage, and the word *then* in the limitation to the value of the vessel and her freight pending is an express reference to the time of the loss or the accruing of the cause of action as the time of the valuation.

In English decisions of an earlier date than the Act of Congress of 1851, and which were well known to lawyers in the United States, it was well established that in applying the provisions of the English acts (26 Geo. 3, ch. 86, A. D. 1786, and 53 Geo. 3, ch. 159, A. D. 1813), limiting the liability of a shipowner to the value of the vessel and the freight due, and to grow due where no time was mentioned in the act, that the existing value at the time of the loss or of the accruing of the causes of action determined the limitation.

Wilson *against* Dickson, M. T., 1813, in the Kings Bench, 2 Barn & Ald., 3, is the leading case. It was an action against the defendants as shipowners. The declaration was in tort and stated that the plaintiff had shipped goods on board the defendant's ship to be delivered at Senegal; that defendants received the same for that purpose, yet that they did not deliver them, and that the goods

were by their negligence lost to the plaintiff. There was a count in trover—plea, not guilty.

It was determined in this case that the words, the value of his or their ship or vessel, must, unless there are some other words to control them, mean the existing value at the time when the loss takes place. It was said, further, the mode of ascertaining that value is a matter of evidence, and may possibly be attended with some degree of difficulty. Bayley, *J.*, p. 15.

Cannan and others *vs.* Meaburn, 1 Bing., p. 465, H. T., A. D. 1824, is a case of greater interest on the facts.

It was an action upon the case brought by the plaintiffs against a shipowner for damages by the loss of goods shipped on board the *Lady Banks* at Calcutta, bound for London.

The captain abandoned the ship at the Mauritius, at which time, from the damage the ship had sustained, the value was considerably reduced.

Admitting the case to be within the statute, 53 Geo., 3 C., 159, one question was, whether the limitation as to value was at the time the cargo was put on board her at Calcutta, or at the time the cause of action arose, viz., the period when the captain abandoned the voyage at the Mauritius, at which time, from the damage the ship had sustained, the value was considerably reduced.

The Referee thought that the value at the time when the plaintiff's cause of action arose by the abandonment of the voyage at the Mauritius was the proper value, and awarded accordingly, but stated that if he were wrong the verdict ought to be increased by the addition of £2,500. The Court took the view of the Referee.

The *Benares*, May 23, 1850, a case in admiralty, before Dr. Lushington, is referred to as showing the method of dealing with these cases by that Judge, and the principle on which he acted in giving effect to the statute 53 Geo. 3, c. 159.

The date of Brown *vs.* Wilkinson in the Exchequer (15 Mees and Welsby, 391) was April 28, 1846, a date comparatively recent when the Act of Congress of 1851 was passed, and it was no doubt before Congress or the Judiciary Committee of the Senate.

The marginal note in that case is as follows: The liability of a shipowner for the damages done by the collision of the ship with another vessel is limited by the statute 53 Geo. 3d, c. 159, to the value of the ship, at the time of; that is, immediately before the collision. He is not therefore exempted from liability where by the same collision his own ship instantly founders.

What did Congress do about this? It did not adopt it. It inserted in what is now sec. 4,283 of U. S. R. S. in the limitation to the value of the interest of the owner of such vessel and her freight, then pending, an express and unambiguous reference to the time of the collision, or of the accruing of the cause of action therefor, so express and unambiguous as to exclude any valuation of the vessel at a time before the collision when she is lost by it.

Baron Parke in his opinion discusses the limitation in the clause for an apportionment in 53 Geo. 3d, c. 159, which is not the clause upon which the provisions for an apportionment were modeled in the Act of Congress. These were modeled upon the provisions for an apportionment in the act of 26 Geo. 3d, c. 86, with different limitation.

Baron Parke points out a difficulty which would arise under the limitation on the apportionment clause in the Act of 53 Geo. 3d to the existing value, if there are several losses, and his suggestion is that this difficulty would be removed if the value at the commencement of the voyage, which is that which naturally would be the amount of the shipowner's insurance, and which would be the same whatever the number of accidents might be during the voyage; should have been considered as the value contemplated by the act.

It is singular that any judge, with the express reference in sec. 4283 to the time of the loss or of the accruing of the cause of action, as the time for the valuation of the ship and freight pending with experience in the practical administration of justice, should not see that in the reduction of this limitation to the value of the ship, as reduced by a subsequent independent disaster, while the ship was proceeding on her voyage, not for account and risk of the injured ship, but for account and risk of her

owners, he is acting in disregard of his obligation to respect the integrity of the statute, and depriving the limitation of all value.

Second.—In Norwich Co. *v.* Wright, 13 Wallace, 104, as applied by Judge Strong, *In re* Petition of the Norwich, &c., Co., 17 Blatchford, pp. 229, 232, the limitation of the recovery against the offending ship was to her value as left by or as reduced by the collision.

> The Circuit Justice, in his opinion in this case (p. 49), recites a passage from the opinion of Judge Strong in the Norwich Co. case as follows: "Had the vessel proceeded on her voyage after the collision, and had she met with a second disaster, occasioned by the fault of the master, on which her value had been greatly reduced, could she then have been surrendered or transferred in full satisfaction of the claims against her or her owners arising out of her first fault? Would her value after the second disaster have been the measure of the owner's liability? I cannot think such a position can be maintained; surely such is not the spirit of the statute; and if not, it seems equally plain that the liability of the owners is not enlarged by the fact that after the collision the boat has been raised and repaired by them at large expense, or, in other words, has increased in value."
>
> This passage is recited by the Justice holding the Circuit in this case to question its soundness.

It is in accordance with the principle of the American system under sec. 4283, and the English under like provisions, in which the limitation as to value on the occurrence of any loss, which is a cause of action under the act limiting the liability of a ship owner is as deteriorated by previous casualties on the voyage, but not subject to depreciation by subsequent disasters.

In the case of the *Scotland*, in this Court, judgment was given in favor of the libellants to the amount of the value of the wreck and strippings to which the *Scotland*, the offending ship, was reduced by or in consequence of the collision through her fault.

The limitation of the recovery involved in this judgment to the value of the offending ship as reduced by or in consequence of the collision is the same in principle as that adopted by Judge Strong, *In re* Petition of Norwich Co. *v.* Wright.

In this limitation the damage sustained by the offending ship, through the fault of the persons in charge of her navigation, which, by the common and general admiralty law of the United States, is to be borne by her owners, is transferred to the innocent and injured ship or her owners, and the result as to the measure of the recovery is the same as would be reached by an abandonment of the offending ship to the injured ship owner, for on such an abandonment there would remain to the owner of the injured ship the value of the wreck and strippings.

If to the value of the wreck and strippings of the offending ship in the case of the *Scotland*, as ascertained after the collision, should be added the damage and loss to herself through the fault of those in charge of her navigation, which, by the general law is to be borne by her owner, the result would not be materially different from the result of the adoption by Baron Park of the value immediately before the collision as the measure of the value at the time of the collision.

It is not necessary in this case, where there was no loss to the offending ship by those in charge of her to be transferred to the injured ship or owner, to raise any question as to the authority under the statute to make such transfer.

In a case where, as in this case of the *Daphne*, the offending ship sustains no damage, and was of the same value before and after the collision, there is no difference

between the practice of the English and American Courts in ascertaining the value at the time of the collision, or when the cause of action for the collision accrues, and there is nothing in these cases to the prejudice of the limitation claimed by the libellants as the owners of the *Daphne*.

And there is nothing in the case of the *Benefactor*, reported 103 U. S. Reports, 239, which is cited against us to prejudice this case of the *Daphne*.

The steamship *Benefactor*, on a voyage from New York to Wilmington, North Carolina, came in collision with the schooner *Susan Wright*, on a voyage from Matanzas, Cuba, to the port of New York, off Squam beach, on the coast of New Jersey, by which the schooner was sunk, and vessel and cargo became a total loss, whereupon the steamship returned to New York, and brought with her the crew of the *Susan Wright*, and such effects as were saved, and after remaining a few days proceeded on her voyage. While in New York she was libelled for the damage to the *Susan Wright* and cargo, and was released on bonding.

After the trial of the cause of collision, upon its merits and a final decree, a petition was filed on behalf of the owners of the *Benefactor*, for the benefit of a limited liability, which was dismissed in the District Court, and the dismissal affirmed by the Circuit Court, on the ground that the petition came too late. On the argument on the appeal to this Court, it was first prominently brought to the attention of this Court that the right to the limitation vested in the shipowner by section 4283 of U. S. R. S., was absolute and unconditional, and without respect to and independent of any abandonment, and without limitation of time, and that was the only question argued.

The decision of the Court below in denying the right to the limited liability and dismissing the petition, was overruled, and the shipowners' claim to a limited liability sustained.

The learned Justice who delivered the opinion of the Court in limiting the range of his argument, says: What may be the rule if, after the collision has occurred, the offending vessel should meet with further disaster, greatly impairing her value, is a question which may require fur-

ther consideration when the case arises. Nothing of the kind is alleged in the present case.

This reservation is recited in the opinion of the Justice at the Circuit (p. 50), and referred to (on p. 52) as a reservation which must be accepted as only an expression of that proper judicial caution which leaves open in form questions which are not *sub-judice*.

He had before said (on p. 47), that in a case like the present, the question as to the proper rule in a case like the present, has not been decided by the Supreme Court, no such case having been before it.

Third.—Sections 4284 and 4285 of the U. S. Revised Statutes provide for the institution of appropriate proceedings in any Court for the purpose of apportioning the sum for which the ship owner may be liable, *among the parties entitled* thereto, whenever any such embezzlement, loss or destruction, as mentioned in the foregoing section 4283, is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever on the same voyage, and the whole value of the vessel and her freight for the voyage, is not sufficient to make compensation to each of them.

This apportionment, according to the provisions of these sections, is to be made through the action of any Court in which the proceedings therefor shall be instituted and conducted to a judgment, or through the action of a trustee to be appointed by any Court of competent jurisdiction to whom the ship-owner may transfer his interest in such vessel and freight for the benefit of such several freighters or owners, of goods, wares, merchandise or any property whatever on the same voyage, who shall be entitled to participate in the apportionment of the sum for which the owner of the vessel may be liable, the apportionment by such trustee to whom the vessel shall be transferred is to be made by proper measures to be taken by such trustee under the direction of the Court appointing him.

If the apportionment is by proceedings in a Court, it

would be the duty of the Court to ascertain the amount to be apportioned, for which the ship owner is liable and take proof of claims of parties entitled to participate in the apportionment, and make an apportionment among them according to their respective losses, of the amount for which the ship owner is liable, and render judgment against the ship owner to the amount for which he is liable.

If the apportionment is made through the action of a trustee to whom the ship may be transferred, he is to take measures to ascertain the amount to be apportioned and make an apportionment among the parties entitled and make a report to the Court appointing him for such action, by judgment or otherwise, as shall be just.

The time for the institution of the proceedings for the purpose of apportioning the sum for which the owner of the vessel may be liable, among the parties entitled thereto in the case supposed, of there being several sufferers as freighters, etc., on the same voyage, is after the termination of the voyage, for until then it can not be known who the several sufferers on the voyage are who may be entitled to participate in the apportionment.

The parties to the proceedings for the apportionment are freighters and owners of the property on the same voyage, who have not received compensation or been provided for by previous limitations and the owner or owners of the vessel.

And it is provided that the freighters and owners who are sufferers, including only, of course, those who are entitled to participate in the apportionment, or any of them may take the appropriate proceedings for the apportionment.

Sufferers who have received compensation are not entitled to participate in the apportionment. Parties to actions who are secured by the liability of the ship owner to the extent of the limitation to the value of the ship, and freight pending when their cause of action accrued, are not entitled to participate in the apportionment, which

latter as under the English acts as well as under the Act of Congress, is a provision for parties who are not secured under previous limitations; and if such provision is not sufficient it is the fault of the statute, and not a ground for subverting a previous limitation at the time of the accruing of a cause of action for which suit is brought.

Bringing sections 4284 and 4285 into antagonism with section 4283 for the purpose of subverting the limitation in section 4283 is disingenuous.

Fourth.—The Circuit judge in his opinion says that the limitation in sec. 4284, to the whole value of the vessel, and the freight for the voyage, for which the ship owner is to make compensation, is the value of the vessel and the freight at the close of the voyage.

This is a mistake; the whole value of the vessel and the freight for the voyage, is the value of the vessel in its entirety as at the commencement of the voyage, without any deduction for damage or deterioration, and the freight for the voyage is not the freight at the end of the voyage, but the freight engaged when the cargo was laden on board.

The Judge might as well have said if a ship owner took out a policy of insurance on the whole value of his vessel and the freight for the voyage, if ship and freight were lost, the insurance company would not be liable, except for the value of the wreck and freight saved.

Baron Parke in Brown *v.* Wilkinson, 15 Mees & Welsby, 397, points out a difficulty which would arise under the limitation in the apportionment clause in the Act of 53, Geo. 3, by construction of the English Courts to the existing value, if there are several losses, and there is something like this in the opinion of the Judge at the Circuit Court in our case.

Baron Parke says this section (the one providing for an apportionment in the English act) does not appear to have

been considered by the Court in Wilson *v.* Dickson, and possibly, if it had been adverted to, the value risked in the adventure, that is, the value at the commencement of the voyage, which is that which naturally would be the amount of the ship owner's insurance, and which would be the same whatever the number of accidents might be during the voyage, would have been considered as the value contemplated by the act.

Under the limitation in sec. 4284, whenever any such embezzlement, loss or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses, makes room enough for the case of several losses.

In the provisions in sec. 4285 for a transfer of the ship to a trustee to be appointed by a competent Court for the benefit of *such claimants*, such claimants are the sufferers in the next preceding section mentioned, who shall be entitled to participate in the apportionment.

There is no warrant in this section for a transfer of the ship to any other claimants or parties, and there is no time when such transfer is authorized, except at the end of the voyage, to a trustee, appointed by the Court, to whom the transfer is to be made, for an apportionment.

There can be no greater mistake than the reference to this clause, as authorizing the tender of the ship at different stages of the progress of the voyage, to anybody or to any party plaintiff in an action, [redacted] in the opinion of the Court below, in this case, in a passage where he supposes that the validity of the limitation under sec. 4283, was affected by the shortness of the interval between the time when the steamship backed out from the collision, and when she was run ashore on Fire Island beach, at a distance off from the place of collision of one hundred and fifty miles, not being sufficient to allow of a tender of the steamship worth $140,000 to

$150,000 before her stranding, and for which there would be no possible motive.

Under the limitation in sec. 4284, the conditions of the transfer of the ship to a trustee at the end of the voyage, to operate as a discharge of the owner, are that she must be an existing ship, and sufficient to make compensation to the extent of the value of the ship and freight for the voyage at the commencement thereof, or before deterioration and loss of freight.

The transfer of a ship to a trustee for the benefit of creditors has no more effect than the transfer in an assignment of any other property to a trustee for the benefit of creditors to discharge the assignor.

All that the provision in the last clause of the section means is, that upon the transfer of the ship to a trustee appointed by a competent Court is, that all claims and proceedings by action against him shall cease.

Vide Norwich Co. *v.* Wright, 13 Wall, 119.

But it would be the duty of the trustee to take measures under the direction of the Court, appointing him to ascertain the value of the ship in its entirety, without deduction for disasters on the voyage, and of the freight for the voyage, apply the proceeds of the ship on account, take proof of claims against the owners, and report the deficiency, if any, to the Court for judgment against the owner.

Fifth.—But is the case of a collision within the apportionment clauses, in sections 4284, 4285 ?

I maintain that it is not. It is in section 4283, but there were good reasons for omitting it in the latter sections.

53 Geo. 3, ch. 159, A. D. 1813, was the first act which included collisions with outside vessels. It is included in the section applied to the limitation of the liability of ship owners in actions against them; and it is included in the

clauses for an apportionment under that act to be instituted only by the ship owner. Nearly forty years passed after the date of the Act of 53, Geo. 3, before the Act of Congress of 1851. In making apportionments under the clauses for an apportionment in Act 53, Geo. 3, including collisions, the first difficulty was to find a Court which could try a collision cause, and the litigation growing out of the including collisions, was interminable, postponing adjustments under that act, indefinitely.

Claims of freighters on a ship could and can be adjusted by an average adjusting broker with a freight list without litigation.

In the Act of Congress the apportionment clauses do not follow the Act of 53, Geo. 3.

It is framed upon the provisions for apportionment of 26 Geo. 3, ch. 86, in which collisions were not included.

The words whenever any such embezzlement, loss, or destruction. is suffered by several freighters or owners of goods, wares and merchandise, or any property whatever on the same voyage, are not apt words to include a suit for loss or damage, or injury by collision. The only such embezzlement, loss or destruction, mentioned in the preceding section, is any embezzlement, loss or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel.

All that the words in section 4284, whenever any such embezzlement, loss or destruction, is suffered by several freighters or owners of goods, wares, merchandise or any property whatever, on the same voyage, include, are freighters or owners of goods, wares, merchandise or any property freighted or shipped on the same voyage.

But if an American ship be within the provisions of the Act of Congress for an apportionment, a British ship, such as the *Great Western*, is not within.

This Court has no jurisdiction to ascertain and determine claims involved in the apportionment for embezzlement, robberies, making away with property, &c., on a British ship, which is British territory.

Points Under the Second Assignment of Error.

First.—Upon the findings of fact by the judge, that the owners of the steamship on the 28th and 29th March 1876, made an abandonment of the steamship to the various underwriters who had insured her, and that before and at the time of her stranding the said steamship was under insurance effected by the owners thereof to the amount of £34,000, which they realized from the insurance companies, by the payment to them of that sum as for a total loss, after tender of an abandonment, he was in error in holding that the respondents claiming a reduction to the value of the steamship, as reduced by the stranding, were not under obligation to bring in the insurance which covered the loss, and in limiting the recovery to the value of the wreck, excluding the insurance.

Second.—This question of the insurance is one upon which there is a conflict of opinion between judges and lawyers of different schools.

One school recognizing Valin and Pardessus as the better authorities, from their treating the ship in the possession of the owner as an asset for the payment of the debts of the ship as they arise, and the owner of the ship in possession in relation to its creditors before a loss occurs as a holder of the ship for account of the creditors of the ship when such loss occurs, and by reason of these great jurists being more thoroughly imbued with the spirit of the maritime law and its equities, maintain with them that insurance effected upon the ship to provide for repairs and restoration in case of damage or loss of the ship on the voyage, that the insurance follows and represents the ship in case of its loss.

The other school, who adopt the opinions of Emerigon and Boluay Paty, and regard the ship simply as a structure for the conveyance of freight and passengers without regard to its obligations, deny that the insurance follows and represents the ship in case of its loss.

Valin and Pardessus are often cited by American jurists, such as Ware and Story, and their opinions have been regarded in the American Courts as of higher authority. Notwithstanding the greater weight of authority of the jurists who affirm that the insurance follows and represents the ship in the case of its loss, the adoption of one opinion or the other in our Courts must depend upon the preponderating weight of the grounds of principle and equity on which it stands.

Third.—The premium paid for insurance is capital laid out by the ship owner as part of the outlay in fitting out the ship for the voyage, and in ship owner's accounts it is charged to the ship, in the same account in which the ship owner charges to the ship expenses for the purchase of anchors. chains or cables, tackle, apparel or other equipment or necessaries of the ship for the voyage; and it is as much an interest of the owner in the ship as the chains, cables, tackle, boats or other equipments.

"According to the ordinance of 1681 (Liv. III, title VI, art. XX), the premium was treated as a maritime outlay, and could be insured."

"Although there is no express provision of the German Code for insuring the money paid for premiums, Dr. Lewis states in his treatise, that the premium for insuring a vessel and freight falls in the same category with other expenses of outfit" (Das Deutsche Seerecht. Vol. 2, p. 189).

In the third volume of the Court de Droit Maritime, by Cresp-Laurin, the writers refer to art. 342 of the French Code, permitting insurance of the premium, and states the principle of the rule as follows:

"Why? Because the premium increases by so much the value of the thing at risk; like all the other outlays, expenses or just costs, it makes part of the value; it enters into the schedule."

The premium for the insurance being a part of the outlay as much as for any other necessary in the outfit of the ship, it and the proceeds of the insurance when a loss

arises forms a part of the interest of the owner in the ship as much so as the expenses for other necessaries, anchors, chains, cables, &c., and the anchors, chains, cables, &c., or other equipments, themselves purchased for the ship for the prosecution of the voyage. And the premium for the insurance and its proceeds, when a loss happens which is covered by the insurance, forms a part of the sea property of the ship owner on the voyage, in contradistinction from the land fortunes of the ship owner, which by the general maritime law are exempt from liabilities arising from risks of the voyage.

The premium for the insurance and its proceeds when the loss happens which is covered by the insurance, being a part of the interest of the ship owner in the ship, and of his sea fortunes therein, how is the insurance and its proceeds appropriated to the use of the creditor of the ship?"

The answer is easy.

The appropriation of the insurance as an interest of the ship owner in the ship, and as forming part of the sea fortunes of the ship owner, in contradistinction to his land fortunes, which are exempted from liabilities arising from the risks of the voyage, is a correlation to the principle which exempts the land fortunes of the ship owner, and necessary to complete the system in which the land fortunes of the ship owner are exempted from liabilities from risks of the voyage in consideration of the appropriation of the sea fortunes of the ship owners in the adventure of the voyage being appropriated to the creditor.

Fourth.—Without pursuing this question further in this the general brief of the appellants, we respectfully refer the Court to the points of argument and the authorities cited in a brief of Mr. Putnam, of counsel for the appellants in this case, on this question of insurance, filed in the case of the National Steam Navigation Company *v.* Dyer, in this Court, December 24, 1884.

And to a supplemental brief of that gentleman on

the same question filed in this case, with this the appellant's general brief, in which his associate counsel think there are some matters of great interest well presented.

The passages in quotation marks above recited are taken from Mr. Putnam's brief.

Points under the Third Assignment of Error.

First.—The District Judge in his opinion, after denying that the limitations of the Act of Congress of the United States could be referred to in determining the limitations to the ship owner in the case of a collision on the high seas between ships of Norwegian and British owners, continues as follows:

"The inquiry, therefore, arises whether there be any rule of the general admiralty law by which the defendant's liability is limited; for if not, his liability upon principles of natural justice must be held to extend to the full measure of the damages occasioned by his wrongful act.

As to the existence of a rule of the general maritime law upon the subject under consideration there is no room for controversy, it having been ascertained and declared by the Supreme Court of the United States in the following language:"

"By the maritime law the liability of the ship owner was limited to his interest in the ship and freight for all torts of the master and seamen whether by collision or anything else, and sometimes even for the master's contracts, and his liability was so strictly limited that he was discharged by giving up that interest or by the vessel being lost on the voyage, and the maritime Courts found no difficulty in carrying this law into execution."

Norwich Co. *vs.* Wright, 13 Wall., p. 119.

This system of limitation of the general maritime law has never been adopted as part of the maritime jurisprudence of the United States, or if there was ever any ground for saying that it had been or was adopted in the maritime law of the United States it was abrogated by the Act of Congress of 1851.

The system of limitations of the liability of a ship owner prescribed by the Act of Congress being a limitation only of his liability in actions for certain enumerated causes of action is so far inconsistent with and repugnant to the above supposed system of limitation of the general maritime law that it repealed it by substituting a different narrower system of limited liability of the ship owner.

United States *v.* Claflin, 97 U. S. (7 Otto), 546, Supreme Court, 1878.

Butler *v.* Russell, 3 Clifford, 1st Circuit (Mass.), 1869. To nearly same effect, S. C., 11 Int. Rev. Rec., 80.

Heckman *v.* Pinkney, 81 N. Y. Rep., 211, A. D. 1880.

The People *v.* The Gold and Stock Tel. Co., 98 N. Y. R., Danforth, *J.*, delivering the opinion of the Court, p. 76, A. D. 1885.

There being no proof that the systems of limitation of the liability of a ship owner in Norway and Sweden and Great Britain are the same, the only limitations applicable to the case are the limitations of the law of the forum of which the above mentioned system of the limitations of the general admiralty law forms no part.

Second.—It will be a waste of time to argue that the peculiarly French practice in the French Courts of a tender by an amendment to the answer so long after the abandonment of the *Great Western* on the 28th and 29th of March, 1876, such as excepted to in the first above mentioned exception, or that the performances excepted to in the above mentioned second exception, or that the

performances mentioned in the above sixth holding of the judge, were not available or material to the respondent, as a means of limiting his responsibility under any Admiralty law or practice known in the Courts of the United States.

Finally.—It is submitted that the decree of the Circuit Court should be reversed and the libellants restored to all that they were deprived of by the decree of the Circuit Court, with interest and costs in this Court.

C. VAN SANTVOORD,
HARRINGTON PUTNAM,
Of Counsel for Appellant.

J. K. HILL, WING & SHOUDY,
Proctors for J. Thommessen *et. al.*,
Appellants.

[J7343]

U. S. Supreme Court.

JENS THOMMESSEN AND JULIUS SMITH,

OWNERS OF THE NORWEGIAN BARK "DAPHNE,"

Libellants and Appellants,

vs.

MARK WHITWILL,

Respondent and Appellee.

Appendix to Brief and Points of the Appellant.

JAMES K. HILL, WING & SHOUDY,

Proctors for J. Thommessen et al.
Libellants and Appellants.

C. VAN SANTVOORD,
of Counsel.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

Appendix to Brief and Points of the Appellants in

THOMMESSEN v. WHITWILL.

I. The authorities in brief of Mr. Putnam, of counsel for the appellants in Thommessen *v.* Whitwill collected, on the question of insurance, which was filed in the case of the National Steam Navigation Company *v.* Dyer, in this Court, Dec. 24, 1884. See fourth point under second assignment of error in the general brief of the counsel for the appellant in Thommessen *v.* Whitwill.

II. First Division. Direct authorities that under the general maritime law of Continental Europe, irrespective of special modern legislation of different States in Europe, with which we have no concern, a shipowner seeking to relieve himself from liability by an abandonment in case of loss of the ship must account for the insurance.

Second Division. Authorities proving that the premium of insurance is capital invested in the outfitting or outlay of the ship, and constitutes an interest in the ship for the voyage, and that the premium of insurance and the policy form a part of the sea property of the shipowner, as contradistinguished from what is called his land property, of which latter the principle of exemption thereof from the risks of the voyage involves a subjection and an appropriation of the sea property to the payment of the creditors.

After the introductory statement the following authorities are cited.

III. Direct authorities (first division.)

I. French Authorities.

M. Cresp, Cours de Droit Maritime; Paris, 1876–1878. Edited by M. Auguste Laurin, in 4 vols., the last in 1882. Mr. Putnam's brief, p. 3.

Valin, Nouveau Commentaire sur l'ordinance de la Marine, published in 1760. (On pages 3 to 5.)

Emerigon, writing in 1784, in his treatise "Contrats a la Grosse,' (Ch. 12, Sec. 7,) dissented from Valin, and his dissent gave rise to a controversy which divided the French jurists, and which continued after the Code of Commerce went into operation; which, containing no express enactment on this subject, left the matter open for the application of the principles of the general maritime law.

This statement on the authority of M. Laurin, editor of the work of M. Cresp above cited. (On page 5.)

Pardessus, in successive editions of his Cours de Droit Commercial, maintains that upon the principle of the general maritime law of Europe, the insurance should be included in the abandon required to discharge the ship-owner. (On page 5 and 6.)

Boulay Patty Cours de Droit Commercial, issued in 1822, held a contrary view, following Emerigon, whose Contrats a la Grosse he edited in 1827.

The Cours de Droit Commercial of Pardessus was more generally accepted, and his opinion prevailed in the Courts.

On p. 7.

Historical summary and arguments entitled to consideration by this Court in favor of adopting the opinion of Pardessus as the best evidence of the rule of the general maritime law, irrespective of special modern, differing

legislation of different States in Europe, with citations of authorities.

Pages 7 to 21.

11 German Authorities (direct) on pages 21 to 30.

IV. Deduction from the foregoing on pages 30 to 31; more particularly the 2d, 5th and 7th.

V. Authorities proving that the premium of insurance is capital invested in the outlay or outfitting of the ship for the voyage, and constitutes an interest in the ship for the voyage, and that the premium of insurance and the policy form a part of the sea property of the ship as contradistinguished from what is called his land property, of which latter, the principle of an exemption thereof, by the general maritime law, from the risks of the voyage, carries with it the appropriation and subjection of the sea property to the payment of the creditor of the ship.

These are collected under subdivisions, first and second, on pages 34 to 36 of Mr. Putnam's brief.

VI. The Benares, May 23d, 1850, 1 Eng. Law and Equity Reports, is referred to (the principle of the decision) as an authority that the insurance is to be applied in payment for the loss of the ship without deduction for expenses, claims of material men, seamen's wages, towage, or other charges, for which the maritime law gives a lien on the ship.

C. VAN SANTVOORD,
of Counsel for Appellants.

118 5 20

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 333.

JENS THOMMESEN AND JULIUS SMITH,

Libellants and Appellants,

vs.

MARK WHITWILL,

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE.

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SUPREME COURT OF THE UNITED STATES.

JENS THOMMESEN and JULIUS SMITH,
Libellants and Appellants,

vs.

MARK WHITWILL, impleaded, &c.,
Respondent and Appellee.

October Term,
1885.
No. 333.

BRIEF FOR APPELLEE.

On the night of March 24, 1876, a collision occurred on the high seas, about 175 to 180 miles from Sandy Hook, and about 150 miles from the beach near Fire Island Light House, on Long Island, between the barque Daphne, bound on a voyage from Baltimore to Marseilles, and the steamship Great Western, on a voyage from Gibraltar to New York with a cargo, from which collision the barque sustained damage in the sum of $17,023.44 (Record, pp. 41, 42).

The Daphne was a Norwegian barque owned by the libellants, who were, at the time of the collision, and at the time of filing the libel in this cause, Norwegian subjects, and domiciled in Norway (p. 42).

The Great Western was a British steamship

owned in part by the respondent, Mark Whitwill, who was, at the same times, a British subject, and domiciled in Great Britain (p. 42).

The value of the steamer at the time of the collision, whether ascertained by reference to her condition before the collision, or to her condition after the collision, and before her subsequent stranding, was about $140,000 (p. 42).

The steamship continued her voyage after the collision, and on the night of March 25th, while still on her voyage and before reaching New York, was stranded and wrecked on the southern coast of Long Island, from a cause in no way growing out of, or connected with the collision, and not directly from any peril of the sea, or without the act of man mingling with it, but by the careless navigation and fault of the persons in charge of her (p. 42).

The Great Western, at the time of the collision and of her subsequent stranding and loss, was under insurance effected by her owners, in the sum of £34,000, and on the 28th and 29th of March, 1876, the owners of the steamer tendered an abandonment of her to the various underwriters who had insured her, and thereafter realized the entire amount of such insurance, by the payment to them of that sum by the underwriters, as for a total loss after such tender of abandonment (pp. 36, 42).

After the tender of abandonment, and on various dates down to the 12th of May, 1876, the wreck of the steamship, and the materials saved therefrom, were duly sold at public auction, for account of whom it might concern (pp. 36, 37, 42).

The sales were duly and publicly advertised in the city of New York, but no notice otherwise than by such publication was given to the libellants. They were made for the account of the under-

writers and pursuant to directions from the owners, and after paying the expenses of saving and selling the property, the sum of $1,796.14. was realized (p. 43).

The Daphne put into New York and on her arrival there, and on the twenty-seventh of March, 1876, a libel *in personam* was filed in the District Court for the Eastern District of New York, in the name and on behalf of the libellants, her owners, against the respondent Whitwill and John Doe to recover the damages sustained by the barque in the collision (p. 19).

In pursuance of the prayer of the libel, process with clause of foreign attachment was issued on the same day to the marshal, and in obedience thereto, the marshal attached other property of the respondent Whitwill, who, being thus compelled to appear, did appear in the action on the 29th of March, 1876, and gave a stipulation for value for the attached property (pp. 3–6), and subsequently filed his answer, the seventh article of which is as follows:

"*Seventh.*—He alleges upon information and be-
"lief that if the matters alleged in said libel be true
"and the libellants' claim for damages resulting
"to said bark or her cargo, or both, from the
"alleged collision, shall be established herein
"against this respondent, the liability of this re-
"spondent therefor is limited to the amount or
"value of his interest in the said steamer Great
"Western and her freight upon the voyage during
"which such collision occurred, and this respond-
"ent's said interest in said steamer and freight
"is of no value whatever" (p. 7).

On the trial in the District Court, the answer was ordered to be amended by adding at the close of

the article quoted, the words, "and he hereby sur- "renders the same to the libellants" (p. 43).

The respondent Whitwill also, on said trial, tendered to the libellants, in open Court, the following surrender, duly acknowledged, executed by his duly authorized agent, and the execution of which was duly ratified by said Whitwill (p. 43):

"Know all men by these presents, that I, Mark "Whitwill, of Bristol, England, heretofore part "owner of the steamship Great Western, do here- "by surrender to Jens Thomessen and Julius "Smith, of Arendal, Norway, owners of the bark "Daphne, all my interest in the steamship Great "Western and her freight as of the date of March "25, 1876.

"In witness whereof I have hereto set "my hand, this 19th day of April, "1877.

"MARK WHITWILL,
"By W. D. MORGAN, *Agent.*"

It did not appear on the trial in the District Court, that the steamer was under insurance, or that the sale of the wreck was for account of the underwriters after tender of an abandonment.

The District Court held that the respondent was not entitled to the limitation of liability claimed in his answer, under the Revised Statutes (secs. 4282 to 4289) on the ground that these provisions of the statutes had no extra-territorial effect, and did not therefore apply to cases of collision upon the high seas between two foreign vessels; but that the rights of the parties were governed by the general maritime law, that the surrender tendered in respondent's answer and upon the trial was sufficient, under that law, to entitle him to the limitation

sought if the right to surrender the steamer and her freight had not been lost, under that law, by the sale of the wreck, which, on the proofs before the court, appeared to have been a voluntary sale, and the court accordingly decreed the entire amount of damages sustained by the barque, against the respondent (pp. 18, 19, 23).

An appeal was taken by the respondent on new pleadings and proofs.

At the trial in the Circuit Court, the answer was ordered amended as it had been amended in the District Court, and the respondent Whitwill, again tendered to the libellants in open court, the foregoing surrender, and further offered to produce a paper to be signed by said Whitwill, by said Morgan as his attorney, in all respects like the surrender tendered, except containing a transfer to a trustee for the benefit of the libellants under the provisions of § 4285 of the Revised Statutes of the United States, if the court should be of opinion that such transfer to a trustee, and not a surrender to the libellants should be necessary, and asked that, in such event, the answer be amended accordingly (pp. 37, 43).

The Circuit Court held that the steamship was solely in fault for the collision, that the liability of the respondent Whitwill, was limited to the value of his interest in the steamer in the condition in which she and the remnants of her were after her stranding and wreck, on March 25, 1876, (the cargo having been lost and no freight earned) and that he was liable to respond for such value which was the sum of $1,796.14, and for nothing more (pp. 32–34).

From the decree of the Circuit Court, the libellants prosecute this appeal. The respondent has not appealed.

The questions which have arisen in this case have grown out of the provisions of the laws of 1851, ch. 43, re-enacted in sections 4282 to 4289 of the Revised Statutes, and depend, for their solution, upon the construction to be placed on these sections.

The respondent sought to obtain the limitation of liability for the collision afforded by these sections, in two different and entirely independent ways:

first.—under section 4283, by a plea (modelled upon that in the case of the Scotland, subsequently sustained by this court), that, if liable for the collision, his liability was limited to the amount or value of his interest in the steamer and her freight upon the voyage during which the collision occurred, and

second.—under section 4285, by a surrender to the libellants of his interest in the steamer and her freight as of the date of March 25th, 1876, the date of her stranding and wreck, attempted to be effected by an allegation to that effect in the answer, introduced on the trial in the District Court by amendment, and by the tender to the libellants, on the trial, of the surrender stated.

The trial in the District Court took place before the case of *The Scotland* had been decided by this Court. The District Court entirely disregarded both surrender and plea, so far as based upon the provisions of the Revised Statutes, and denied the respondent any relief whatever based upon the Revised Statutes, holding that the provisions of these had no extra-territorial effect, and did not apply to controversies between foreigners arising out of a collision upon the high

seas between foreign vessels; but it held that the rights of the parties were to be governed by the general maritime law, "part of the law of "nations, consisting of certain rules applicable to "affairs of the sea which have been so often acted "upon and by so many different nations that they "are deemed to have been assented to by all," that, by this general maritime law, the respondent had a right to surrender his interest in the steamer and her freight in exoneration of his liability to the libellants, that the surrender in his answer, and that tendered upon the trial, were sufficient to entitle him to the limitation sought, that an abandonment to insurers and a sale for their account would not constitute a waiver of this right, that, in the absence of evidence that the sale of the wreck was for account of the insurers, it must be presumed a voluntary sale, and that a voluntary sale, by the general maritime law, was a waiver of the right to surrender.

Before the trial in the Circuit Court was had, the decision of this court in the case of *The Scotland* was announced.

That case (105 *U. S.*, 24) established in respondent's favor the following propositions:

a. that our courts administer justice according to our law unless a different law is shown to be applicable, and this rule applies to transactions upon the high seas; so that to controversies in our courts growing out of collisions upon the high seas, our law is applied, unless the two colliding vessels belong to the same country, or, perhaps, to different countries applying the same law, in which case the foreign law, if proved, will govern.

b. that, subject to these restrictions, the Act of

1851 applies as well to foreign as domestic vessels, and to foreign as domestic owners.

c. that the ship owner may take the benefit of the act, affirmatively, in the method indicated in the fourth section of the act, and amplified in the Admiralty Rules, or defensively, by plea or answer when sued, at least as regards the libellants in the cause.

d. that these are merely different methods of reaching the same result, viz., the limitation of the liability of the ship owner to the amount or value of his interest in the vessel and freight, and the ship owner may adopt either method at his election; his right to one is independent of his right to the other; a failure to take advantage of one does not deprive him of his privilege to avail himself of the other.

Upon the trial in the Circuit Court, the respondent again claimed the benefit, under the Revised Statutes, both of his plea and of his surrender.

The Circuit Court held that the surrender by the respondent was inoperative as a transfer of the steamer and her pending freight under section 4285, but that he was entitled to avail himself of the benefit of the statute by plea, and that, under his plea, his liability for the collision was restricted to the statutory limit, the value of his interest in the steamer and her freight after her stranding and wreck.

The questions presented on this appeal, in reviewing the decision of the Circuit Court, are two.

First.—What is included in the term, "the interest of such owner in such vessel and her freight then pending," in section 4283?

Second.—At what period is that interest to be valued, in order to determine the extent of the liability of the ship owner?

FIRST.—The insurance effected upon the Great Western by her owners, is not an element in their interest in such vessel and her freight pending, within the meaning of the Revised Statutes.

(a.) Neither the maritime law nor the continental authorities extended the liability of the shipowner to the insurance upon the vessel.

The rule of the maritime law respecting the liability of owners was stated in

The Phebe (Ware, 265).

"He (the master) was the agent or representative "of the other owners only so far as they had con- "fided their capital to his administration. If the "vessel were lost before the creditors were paid, "they had no remedy except against the master. "The other part owners were discharged from all "responsibility. * *

"There was the same limitation of the responsi- "bility of the owners whether the demand of the "creditor was founded on the contract or tort of "the master, or whether the damage for which he "sought reparation resulted from the fault of the "master or the defects or insufficiencies of the ves- "sel or her tackle or apparel. * * * *

"Thus we find when the principle is traced back "to its source that it is by no means correct to say "that the liability of the vessel is merely collateral "or accessory to that of the owner. On the con- "trary, in the origin of the custom, the primary "liability was upon the vessel, and that of the "owner was not personal, but merely incidental to "his ownership, from which he was discharged

" either by the loss of the vessel or by abandoning " it to the creditors."

A similar statement of the doctrine of the maritime law was made by this Court in

Norwich Co. vs. *Wright* (13 Wall., 104).

" By the maritime law, the liability of the ship " owner was limited to his interest in the ship and " freight for all torts of the master and seamen, " whether by collision or anything else, and some- " times even for the master's contracts, and his " liability was so strictly limited that he was dis- " charged by giving up that interest, or by the ves- " sel being lost on the voyage."

And this has since been reiterated in the later case of

The Scotland (105 U. S., 24, p. 28).

After so authoritative a statement of the rule, reference to the original authorities seems hardly necessary. They are, however, collected in the cases cited and in

The Rebecca (Ware, 187).
Watson vs. *Marks* (2 Am. Law Reg., 157).

" The rule of the maritime law thus recognized " by the Supreme Court of the United States has " also been recognized by the legislation of many " foreign countries, viz.: Portugal, Holland, " Hamburg, Denmark (Code of 1683), Sweden and " Norway (Ordinance of 1667), Russia, the two " Sicilies, Malta in the Lombardo Venetian King- " dom, Sardinia, the countries governed by the " Ordinance of Bilboa, that is, Mexico and the " republics of South America, and by Prussia.

"The rule can, therefore, well be applied here as "an existing rule of the general maritime law upon "the same ground that the international naviga- "tion rules were applied in the case of the *Scotia*, "above referred to. 'In matters affecting the 'stranger or foreigner, the commonly received 'law of the whole commercial world is more assid- 'uously observed, as in justice it should be.'" *Benedict, J.* (*Record, p.* 21).

Nor do the continental authorities state a different rule.

"There is nothing in the Act of Congress that "extends the liability of the owners beyond that "existing under the general maritime law, and by "that rule, there seems to be no room for doubt "that the liability does not extend to the surren- "der of insurance upon the abandoned vessel. "Upon this subject, the continental authorities are "substantially in unison. Indeed, I have been "able to find no one that asserts the rule is other- "wise. Only one intimates an opinion to the con- "trary. I do not propose to quote these authori- "ties at length; copious reference was made to "them by the learned Judge of the District Court, "and I shall not repeat what he has said. His "citations from *Caumont* (*Dictionnaire de Droit* "*Maritime*, title *Abandon Maritime*, §§ 54, 55), "from the *Code de Commerce*, and from *Pouget* "(*Droit Maritime*, *vol.* 2, 415–419), are quite suffi- "cient to show what the maritime measure of "liability was and long had been, when our "Act of Congress was enacted, and to establish "that it did not extend to insurance upon the

" abandoned vessel. I may add a quotation from " Boulay Paty and one or two other sources. In " his vol. 1, p. 297, Boulay Paty says: 'The 'product of the insurance is the price of the pre- 'mium which the shipowner has paid to insure 'the ship. This premium is not bound as a se- 'curity for the debts and obligations of the cap- 'tain. The law expressly binds only the ship 'and freight to that. The Code of Commerce 'gives to shippers a lien only on ship and 'freight; consequently, they have none on the 'insurance. In general, the ship is not repre- 'sented by the insurance which, after the loss 'of the ship becomes a right existing by itself, 'which gives a direct personal action in favor 'of the insured. All these principles beside, 'agree with equity and with the well understood 'interests of commerce.' He says more to the " same effect, and refers to Valin as sustaining him.

" So, in *de Villeneuve et Massé, Dictionnaire du* " *Contentieux Commercial*, word *Armateur*, 20, it " is said: 'The surrender of the ship and freight 'does not extend to the insurance which the 'owner has put upon the ship.' Other similar " authorities might be cited. The subject has not " been passed without debate. In 1841 an effort " was made in the Chamber of Peers to amend the " rule so as to require a surrender of the " insurance procured by the owner beside " the ship and freight, in order to exonerate " the owner. The proposition was much debated, " but it was voted down (*Bedarride, du Com. Mar.* " *vol.* 1, 359). It was then declared that, by the " Code of Commerce, the shipowner is not required " to bring in the insurance money when he makes " the maritime abandonment. * * * * Nor " does Pardessus assert as the doctrine of the

"maritime law, that insurance as well as vessel "and freight must be abandoned to the freighters; "certainly not in the later editions of his work. "At most he says he had brought himself 'to the "belief' that if the ship were insured the credi- "tors to whom the surrender was made would "have the right to demand the amount of the in- "surance, for a reason which he gives that appears "to me to be quite unsatisfactory. But he does "not claim that such a right has ever been "acknowledged (*Droit Commercial ed.* 1841), and "as I have said, I find no Continental authority "that recognizes it." Strong, *J.*

Matter of Petition N. & N. Y. Trans. Co. (17 Blatch., 227).

"It appears to be the settled law that such "abandonment is not required," citing *Caumont* "(*Dict. de Droit Mar.* title *Abandon Maritime.*) * * "The possibility of fraud which, upon this "argument has been urged as a reason for requir- "ing a surrender of the insurance, is considered "and rejected by the same authority (*Id.*, § 55). "So also, it has been adjudged (*Aix, 8th Feb.*, "1832) that the shipowner who, in order to free "himself from loans contracted by the master dur- "ing the voyage, abandoned the ship and freight, "is not bound also to abandon the product of "insurance effected upon the ship. The same was "adjudged at Rennes, Aug. 12, 1822 (see also "*Boulay Paty, vol.* 1, *p.* 297). The *Code de* "*Commerce* is, in substance, a declaration of the "general maritime law, and § 216 of the Code has "been adjudged to be identical with the rule of "the maritime law as declared by the ordinance. * "* * And it was never supposed that either the "ordinance or the *Code de Commerce* compelled a

"ship owner to surrender his insurance money in "order to effect a maritime abandonment. In "1841, the effort was made in France to amend the "*Code de Commerce* so as to require a surrender of "the insurance as well as of the ship's freight. "The considerations affecting both sides of the "question were then pointed out and discussed, "and the amendment rejected with the declaration "that, by the existing provisions of the Code, the "shipowner is not bound to account for the ship's "insurance in order to effect the maritime aban- "donment (*Pouget. Droit Mar., vol. 2, pp.* 415, "419)." *Benedict, J.,*

Matter of Petition N. & N. Y. Trans. Co. (8 Ben., 318, 319).

The interesting brief of the learned advocate for the libellants filed by leave of the court on the former argument of the case of *The Scotland* altogether fails successfully to attack these authorities or to undermine the foundations on which they rest.

An analysis of the German citations shows that the provision of the Prussian code was peculiar to Prussian legislation and was adopted as a rule of Prussian law by positive enactment, which dates from a time when Prussia did not occupy the leading position in the German Confederation and when its importance as a maritime power was not great.

It was a rule different from that prevailing among the other members of the Confederation, and from that of the free cities, and, therefore, from that governing the more important commercial interests, and when, at the conference for the adoption of a general maritime code, it was sought to make it a rule of German jurisprudence, the contrary rule of the maritime law was preferred, and this provision, at the same time, disappeared from Prussian law.

It is a significant commentary upon this branch of the argument that, at the conference, it was believed necessary that the code should contain an express provision to that effect in order that the shipowner's liability should be extended to insurance.

That the shipping interests of Berlin were satisfied with the Prussian rule may be of some importance in discussing the expediency of legislation; its materiality on the question of the existence of a particular rule is not evident.

Nor do the French authors cited sustain the contention that the liability of the ship owner for the torts of the master extends to the insurance upon the vessel.

Valin's theory of the representation of the *res*, in case of loss, by the insurance, did not extend to cases of tort, and an examination of the citations shows that the question principally discussed is one which cannot arise under our statute, viz.: the liability of the ship owner for his own contracts and those of the master, within the scope of the latter's authority, and that the arguments quoted are arguments, not for or against the existence of a rule of law, but for or against the expediency of legislation in reference to the owner's contracts.

(*b.*) *The history of the phrase "interest of the owner in such vessel and her pending freight," proves that it has always been used with reference to part owners, to relieve them from a liability* in solido *to the extent of the value of the vessel and freight, and to limit their liability to the value of their shares therein.*

English legislation on this subject, prior to the

Act of 1851, was embraced in the three statutes, 7 *Geo. II, c.* 15, 26 *Geo. III, c.* 86, and 53 *Geo. III, c.* 159; and its history has been related in *Norwich Co.* vs. *Wright* (*supra*), in *Walker* vs. *Ins. Co.*, (14 *Gray*, 288), and by Mr. Lathrop, in his article in 1 *Amer. Law Rev.*, 598.

The limit of liability prescribed by all these acts, whether in the case of a part owner or of an owner of the whole ship, is the same, the value of the vessel and freight. The phrase, *interest of the owner in vessel and freight*, does not appear, because it would have no application.

The Act of 1851 was principally drawn from the Act 26 *Geo. II, c.* 86, and from either the Revised Statutes of Maine (*Revision* 1840, *Ch.* 47, § 8, *et seq.*), or the Revised Statutes of Massachusetts (*Revision* 1836, *Ch.* 32, § 1, *et seq.*), probably the former, since there are verbal agreements which point to this conclusion, and Mr. Hamlin, of Maine, took charge of the bill in the Senate.

Section 8 of chapter 40 of the Revised Statutes of Maine, which was apparently the source of the third section of the Act of 1851, is as follows:

"§ 8. No ship owner shall be answerable be-
" yond the amount of his interest in the ship and
" freight for any embezzlement, loss or destruction
" by the master or mariners, of any goods or mer-
" chandise, or any property put on board of such
" ship or vessel, or for any act, matter or thing,
" damage or forfeiture done, occasioned or in-
" curred by said master or mariners, without the
" privity or knowledge of such owners."

This is substantially the provision of the Revised Statutes of Massachusetts (*Revision* 1836, *Ch.* 32, § 1), and the phrase, "interest in the ship and freight," in both revisions, is taken from the act of Massachusetts (*Laws* 1819, *c.* 122), which con-

stituted the earliest legislation in the United States on this subject, and was almost literally copied in the Maine statute (*Laws* 1821, *c.* 14), the phrase, of course, on well settled principles, retaining in the revisions the meaning which it had in the statutes revised. (*Bishop on Written Laws*, §§ 98, 144; *United States* vs. *Bowen*, 100 U. S., 568, p. 573.)

The material provisions of the Massachusetts act were as follows:

"§ 1. Be it enacted, etc., that from and after the "passing of this act, no person or persons who is, are "or shall be owner or owners in part or in whole of "any ship or vessel, shall be subject to answer for, or "make good to any one or more person or per-"sons any loss or damage by reason of any embezz-"lement, secreting or making away with, by the "master or mariners, or any of them, of any goods, "wares or merchandise, or any property whatso-"ever, which shall be shipped, taken or put on "board any ship or vessel, or for any matter or "thing, damage or forfeiture, done, occasioned or "incurred by the said master or mariners or any "of them, without the privity or knowledge of "such owner or owners, further than the value of "the interest which such owner or owners have or "had at the time of such shipment in the ship or "vessel, with all the appurtenances and the full "amount of his interest in the freight due or to "grow due for and during the voyage, wherein "such embezzlement, secreting or making away "with, as aforesaid, or other malversation of the "master or mariners shall be made."

That these statutes were based on the 26 Geo. III, c. 86, is apparent from the narrow scope of the protection afforded; but even a cursory exam-

ination shows that the American statutes introduce a different limit of liability in the case of a part owner, and that the construction and object of this phrase in these acts is beyond doubt.

They restrict the gross liability of the owners to the value of the vessel and freight, and the liability of any part owner to the value of his share in the vessel and freight, adopting in this respect no new principle but the well settled rule, among others, of the Consulate of the Sea (ch. 141, 182), Holland (*Ordinance of Rotterdam, Arts.* 126, 127, 167, 2 *Magens*, 101, 102), and Hamburg (1 *Valin*, 569).

The phrase, indeed, can only have been introduced with this intention, and not for the purpose of extending the liability beyond the value of the ship and freight as material things ; for any question concerning insurance could never have arisen. The time when the vessel is to be valued, is stated in the act, and the liability of the owners, within the prescribed limits, is independent of the event of the voyage.

The sections of the act relating to affirmative action by a part owner are not inconsistent with this view.

If a part owner is sought to be held liable *in solido* for the damage, he may plead the act; but if the injured party be made defendant, he is not compelled to receive his damages piecemeal.

Until its adoption therefore, into the Act of 1851, "interest" had been used as synonymous with "share." The phrase had not been used to extend the liability of shipowners, but still further to limit that liability by making provision for part owners of offending vessels.

(c.) *The language of the Act of* 1851 *shows that, in that statute, the phrase retains this meaning.*

Such was the construction placed upon it by Mr. Justice Strong in

In re Norwich & N. Y. Trans. Co., (17 Blatch., 221.)

"The words of the statute are plainly not "designed to enlarge liability, but have for their "purpose making provision for part owners of "offending vessels. Instead of holding a part "owner liable to the extent of the whole value of "the vessel, they limit his liability to the value of "his interest or share, leaving the other part owners "liable to the extent of the value of their shares. "I cannot doubt such is the meaning of the stat-"ute." (p. 234.)

This construction is also favored by the language of the fourth section of the act which provides that when losses are suffered by several persons in the same voyage, and "the whole value of the vessel and her freight for the voyage" shall not be sufficient to make compensation to each of them, they shall receive compensation in proportion to their respective losses. The extreme extent of liability is "the whole value of the vessel and her pending freight," which, therefore, must necessarily be the value of the aggregate of the "interests" of the owners therein or the aggregate value of the shares of the respective owners.

The act is itself silent on the subject of insurance and there is nothing in it from which an intention could be inferred, that a surrender of insurance is required. "It was easy for the statute to have

"provided for liability for, and transfer of claims "for insurance. It fails to do so, whether the mari- "time law did so or not."

And Admiralty Rule 54 is equally silent.

(*d.*) *It is impossible from the nature of the contract of insurance that it should be an interest in the subject matter insured.*

The contract of insurance is a personal contract of indemnity. It is not an insurance of specific things, nor does it attach to the subject matter as an incident or in any manner go therewith as an accessory. It is only a special agreement with the assured against such damage as he may sustain in the loss of, or by injury to the particular things insured.

Lynch vs. *Dalzell* (4 *Brown Cas. in Parl*, 431).

Sadlers' Co. vs. *Babcock* (2 Atk., 544).

The text writers on this subject agree in all essentials in their definition of this contract.

"The contract of insurance" says *Arnould* (*Marine Insurance*) "is a personal contract on the "part of the underwriter to indemnify the party "originally insured against the consequences of "the perils insured against; it is not a contract to "indemnify any one whatever who may become "interested in the subject insured during the con- "tinuance of the risk."

Pothier's definition is similar.

"Insurance is a contract by which one party "thereto assumes the risk of the perils to which a "thing may be exposed, and agrees with the other "party, to indemnify the latter against the loss

"which would be caused him by the happening of "these perils, in consideration of a sum paid or "contracted to be paid, as the price of the risks "assumed."

Traité d' Assurance C. 1, § 1, § 2, pl. 10, 11.

In *Lucena* vs. *Crawford* (2 N. R., 270) many definitions are collected and are thus summed up by Lawrence, *J.*

"These definitions, by writers of different coun- "tries, are in effect the same, and amount to this, "that insurance is a contract by which the one party, "in consideration of a price paid to him adequate "to the risk, becomes security to the other that he "shall not suffer loss, damage or prejudice by the "happening of the perils specified to certain things "which may be exposed to them."

To the same effect are

Dixon on Marine Insurance, p. 6.
2 *Duer on Insurance*, pp. 52, 58.
Marshall on Insurance, p. 7.
1 *Phillips on Insurance*, p. 1.

"Policies of insurance against fire and against "marine risks are both properly contracts of in- "demnity, the insurer engaging to make good, "within certain limited amounts, the losses sus- "tained by the assured on their buildings, ships "and effects."

Dalby vs. *I. & L. L. Ass. Co.* (15 C. B., 365, p. 387).

"It (insurance) is also a personal contract, and "whether the subject matter of insurance be a ship, "or a building, or a life, or whatever else it

"may be, although in popular language it may be "called an insurance upon the ship, or building, "or life, or some other thing, yet it is strictly an "agreement with some person interested in the "preservation of the subject matter, to pay him a "sum which shall amount to an indemnity, or a "certain sum agreed upon as an indemnity, in case "his interest in the subject matter shall suffer "diminution of value from certain specified causes "or in certain specified contingencies. * * * *

"*The contract of insurance does not run with "the subject matter of insurance unless by special "stipulation, wholly foreign to itself, either inter-"polated in the contract or in addition thereto.*"

May on Insurance, § 6.

To the same effect is *Wood* (*on Fire Insurance*, § 249).

"The contract is personal, and insures not the "property, but the assured against loss by its de-"struction, and consequently does not pass as an "incident to the property. Therefore, unless as-"signed with the consent of the assurer, it becomes "inoperative when the interest of the assured in "the property ceases."

The premium, the consideration for the assumption of the risk, is paid by the insured; the contract is made with him, and no one save a party to it, or one in privity with a party to it, can recover upon it.

The insurance upon a thing cannot be an interest in the thing. There is a contradiction of terms. The owner's interest in the thing insured is the subject matter of the insurance, not the insurance.

The absence of insurance does not detract from the value of the subject matter and its presence does not increase the value, and if the insurance

does not, from its nature, pass by virtue merely of a transfer of the subject matter, it cannot be treated in law or in fact as an incident or accessory.

It seems also a necessary consequence of holding a policy of insurance to be an interest *in* the thing insured, to extend every lien upon the subject matter of insurance to the policy upon it.

It is, however, well settled in cases of fire insurance that a mortgagor has no interest in a policy of insurance effected by the mortgagee and the premium upon which has been paid by the latter (*Foster* vs. *Van Reed*, 70 N. Y., 24) and cannot insist that the proceeds of insurance shall, in case of loss, be applied in reduction or extinction of the mortgaged debt.

Nor, on the other hand, has the mortgagee, by virtue of that relation, any interest in, or lien upon, a policy effected by the mortgagor on the mortgaged property, or, in case of loss, upon the proceeds of the insurance.

"We know of no principle of law or of equity "by which a mortgagee has a right to claim the "benefit of a policy underwritten for the mortga- "gor on the mortgaged property in case of a loss "by fire. It is not attached or an incident to his "mortgage. It is strictly a personal contract for "the benefit of the mortgagor to which the mort- "gagee has no more title than any other credi- "tor."

Columbia Ins. Co. vs. *Lawrence* (10 Pet., 512).

"As to the grantee of the property, he can take "nothing by the grant in the policy, since it is "not in any just or legal sense attached to the "property or incident thereto."

Carpenter vs. *Prov. Wash. Ins. Co.* (16 Pet., 496).

And see

2 *Am. Lead. Cas. p.* 826, and cases cited.

It has also been held in this court that the indemnification of a shipper by his insurer is no bar to his action against the carrier for negligent transportation.

Throughout the discussion of this subject, in all the cases, the word "insurance" has been used in discussing what is included in the interest of the owner in the vessel.

It remains to define this term, and it is plain that insurance, as thus used, must mean the policy of insurance and not the proceeds of the insurance; the contract and not the sum paid under it.

The statute has therefore made no distinction between the cases of partial and total loss. The contract is single and indivisible. The same formula insures against partial and total loss. Whether the loss is total or partial, affects the amount recoverable upon the policy and the method of obtaining the proceeds of the insurance, but not the nature of the contract.

The transfer contemplated by the Act of 1851 is of an interest in the vessel, that is, of that which co-exists with the vessel. The act either requires, therefore, the surrender of the policy in every case where a policy has been taken out, or in no case; in cases of partial as well as total loss; for if the policy be an interest in the vessel, the amount recoverable on it may affect the value of the interest but certainly cannot alter its nature.

This objection is not answered by a reference to the abandonment peculiar to marine insurance required in case of total loss, actual or constructive.

If the policy be treated in such a case, as an agreement for the purchase of the subject matter, that does not extend any lien upon the subject matter to the policy; that still remains a personal contract. It does not become an interest in the subject matter. An agreement for the sale of mortgaged property is not subject to the lien of the mortgage. The mortgagee cannot enforce it for his own benefit; the mortgagor may release it at will. A mortgagee has no lien upon the purchase price, though that price be greater than the full value of the property mortgaged. So in the case of marine insurance; the marine insurer takes the property abandoned, as against the lienors thereon, subject to the liens upon it. The legal rights of the lienors over the subject matter are not diminished or affected by the abandonment.

The theory of the French authors cited by the libellants is not based upon the principle that the insurance (*i. e.*, the policy) is an interest in the vessel, but that it and its proceeds are a representative of the subject matter.

This theory is a modern one, and, as stated by M. Laurin, is based on a fiction, and on a fiction which finds no countenance in the statute or foundation in the principles of our law.

Under this theory, it is impossible to hold that insurance is an interest in the subject matter; the two views are absolutely inconsistent. An interest in a thing presupposes the existence of the thing; a representative of the *res* or a substitute for the *res* necessarily involves its absence or destruction.

A transfer of a thing carries with it its incidents, its accessories, but it cannot carry a substitute. Whatever passes as an incident must pass as an incident to something existing as the subject of the

transfer; but as a substitution or representation will not occur until the destruction of that of which the substitute is the representative, it can never pass as an incident.

This is clear from the argument of M. Dufour, who admits that the lien cannot be exercised at the same time on both the *res* and the insurance, making the deduction necessary that the insurance on the *res* is not an interest in the *res*.

The doctrine might, indeed, be called the theory of the representation of the *res* by the insurance, as stated by M. Grivart: "*L'indemnité d'assurance est, en fait, la representation du navire.*"

The justness of this distinction is seen in the case of a technical, partial loss to which necessarily and logically this theory can have no application; and this is admitted by M. Dufour. As long as the *res* remains, as long as it has not become actually or constructively a total loss, the insurance cannot be substituted for it, and the doctrine of representation is without applicability.

The incompatibility of this theory with any construction of the statute is apparent. The impossibility of reconciling it with principles settled by repeated decisions is clear.

Its adoption requires, in the language of M. Laurin, the repudiation of old principles, and the adoption of the fiction that the indemnity of insurance is the mere representation of the subject matter.

(*e.*) *The purpose of this legislation will be frustrated if insurance be held to be an interest in the vessel.*

"The great object of the law was to encourage

"shipbuilding and to induce capitalists to invest "money in this branch of industry. * * * "How many enterprises in mining, manufacturing "and internal improvements would be utterly im- "practicable if capitalists were not encouraged to "invest in them through corporate institutions by "which they are exempt from personal liability, or "from liability except to a limited extent? The "public interests require the investment of capital "in shipbuilding quite as much as in any of these "enterprises."

To attain this object, the United States, in the Act of 1851, adopted the rule of the maritime law, limiting the liability of shipowners for the wrongful acts of the master.

If the rule of the maritime law were adopted as furnishing a just and proper principle by which to govern this branch of the legal relations of shipowners, it is only proper to look to the maritime law for the theory of the rule, and the reasoning on which it was founded, as supplying the best guide to its proper application to the cases arising under the statute.

"By the maritime usages and customs of the "middle ages, * * * the master, who was "ordinarily a part owner, was not considered as "properly the agent or mandatary of the other "part owners, but rather as the administrator "of the property, that is, of the vessel "which was intrusted to his care and man- "agement. He was authorized to employ it "for the common benefit of all the owners " more in the character of the acting partner of a " *societé en commandité* or limited partnership, than " in that of agent for his co-owners. As the gerant " or active partner, he was authorized to act for the

"other owners and bind them in all matters relat-
"ing to the employment of the vessel to the ex-
"tent of their interest in it, or to speak more cor-
"rectly, to bind the property itself, which was con-
"fided to his administration. * * * But
"he was not authorized as master, and as repre-
"senting his co-owners, to bind them beyond the
"value of their share in the ship and freight. *
" * * He was the agent or representative of
"the other owners, only so far as they had confided
"their capital to his administration. If the vessel
"were lost before the creditors were paid they had
"no remedy except against the master. * *
"There was the same limitation of the responsibil-
"ity of the owners, whether the demand of the
"creditor was founded on the contract or tort of
"the master."

The Phebe (Ware, 265).

"The principles of this contract were applied by
"the legislation and jurisprudence of the middle
"ages to the master of a vessel. He was considered
"not precisely as the agent or, in the language of
"the civil law, the *praepositus* of the owners, but as
"standing with regard to them in a peculiar rela-
"tion, which was expressed by the term commend-
"atary. He had control and management of the
"vessel, and in the absence of the owners was au-
"thorized to enter into all contracts which were
"necessary to its employment. His contracts
"bound himself, and operated a tacit hypotheca-
"tion of the vessel. The creditors might pursue
"the master personally, or might proceed by the
"arrest of the vessel. But the owners were under
"no personal liability for the obligations of the
"master, arising either *ex contractu* or *ex delicto*.
"His contracts and torts bound their shares of the

" vessel, but bound them no further. The master " had no authority to compromit their fortunes be- " yond the capital which they had entrusted to " his administration."

The Rebecca (Ware, 198).

There is no injustice in the application of the rule of the maritime law.

The relief afforded by these sections of the Revised Statutes is limited to the torts of the master, or to those breaches of contract caused by the tortious acts of the master, committed without the knowledge or privity of the ship owner.

It is the natural use of a ship to be employed on long voyages, during which it will be *ex necessitate*, entirely beyond the control of the owner ; from the beginning of the voyage, his utmost care will be unavailing to prevent the torts of the master, and, of these, he is entirely innocent.

Under these circumstances, the act recognizes the hardship of subjecting the ship owner to a common law liability as principal, for the acts of the master ; a hardship which is the greater since the rule has no foundation in natural justice, but is purely one of expediency.

" Faults, like crimes, are in their own nature " personal, and are not imputable except to the " persons who commit them ; and upon the prin- " ciples of natural justice, the fault of one person " can never be imputed to another, unless he was " under an obligation to prevent it."

(*See Holmes on the Common Law*, p.25.)

The proceeds of the insurance are the result of a personal contract made with the ship owner, the consideration of which is paid by him. The con-

tract is one which he is under no duty to make, and which, if made, is intended by him exclusively for his own protection and not for the protection of interests adverse to his own.

The effecting of insurance is the mark of prudence; absence of insurance by persons of moderate means denotes recklessness. Legal discrimination in favor of the reckless against the prudent, in favor of the short-sighted against the far-sighted does not commend itself to consideration.

"It would discourage insurances were we to deny "to the ship owner the benefit of the contract for "which he has paid his premium; it would dis- "discriminate to the disadvantage of the small "capitalist, who must insure with third persons, in "favor of the millionare whose extended means "allow him to stand his own underwriter, and "who, not receiving the amount of loss from third "persons, would not be called upon to pay it over "to the shipper, or to the disadvantage of the "prudent in favor of the reckless," and a remarkable instance of this would the case of insurance by a part owner who might be compelled to surrender the insurance while his uninsured co-owners escaped liability, his very prudence and foresight giving rise to the cause of action against him.

If the surrender of insurance should be enforced, the consequence would be, not to secure the insurance for the injured party, but to prevent the ship owner from collecting it.

"If it were never so desirable," said Judge Kane, in *Watson* vs *Marks*, "to turn over the policy on "the ship to the profit or indemnity of the shipper "of cargo, and if it were not of all things the easiest "to cover up the fact that such an insurance was

" in existence, a simple restriction of the assign-
" able quality of the instrument such as we find in
" our policies against fire, would make the effort
" futile. A single line of memorandum would do
" the business."

The courts cannot compel insurers to insure. (1 *Parsons, Mar. Law*, 2). The contract is a personal one. Its conditions and stipulations are determined by the parties effecting it. It is within their power to prevent the insurance from enuring to the benefit of the owners of the injured vessel.

By such a construction of the statute, therefore, the rights and remedies of the injured party would not be extended, but the rights of the innocent ship owner would be limited; the insurance is not secured to the former, but the latter is deprived of its benefits. Such a construction does not grant relief to the creditor, but inflicts a penalty upon the ship owner.

The principal arguments against the construction contended for are that it is inconsistent with a supposed public policy towards carriers; that it is inequitable; and that it is inexpedient, since its consequences would be dangerous.

The first of these objections, if allowed to prevail, would require a construction of the statute disapproved in *Prov. S. S. Co.*, vs. *Hill Mfg. Co.* (109 U. S., 578), and would involve the consequences there deprecated.

Its radical error is, however, the assumption, which is fundamental, that it could not have been intended by Congress to permit a ship owner, a wrongdoer, to indemnify himself against the consequences of his own wrong.

The act does not regard the ship owner who

brings himself within its terms, as a wrongdoer. It carefully distinguishes between those cases where the owner is a wrongdoer, and where he is not; where the injury inflicted is his wrong, and where it is not. In the former case, the statute does not apply; it is only in the latter that it affords protection; but in these, it plainly cannot regard the ship-owner as a wrongdoer, but must logically consider him an innocent person, to whom it would be unjust to impute the tort of the master.

The lien attaching to a vessel for a tort of which she has been guilty, does not spring from the principles of the law of master and servant, or from any of the principles of the common law. It is independent of these. (*The China*, 7 Wall, 53). This lien may be enforced *in rem*, and the value of the *res* is therefore the limit of the owner's liability through the vessel for the tort of the master, and to this extent, a recovery may be had *in personam*.

But if the master's tort is not to be imputed to the ship owner, if the owner is not, in fact or by imputation of law, a wrong-doer, there can be no objection to permitting him to indemnify himself by insurance against an event by which he, as well as other persons, may be losers. He gains nothing. He has lost his vessel by a fault or series of faults which are not to be imputed to him. The insurance which he receives, and for which he had paid the premium, indemnifies him not against the consequences of his own wrong but the wrong of one who as to him is a wrong-doer.

The first section of the act furnishes a further answer to this argument. Congress plainly contemplated a radical departure from common law rules.

But does not the argument from public policy go too far?

If it is against public policy to permit a ship owner to indemnify himself against the consequences of the negligence of the master of his vessel, is not insurance against damages inflicted upon other vessels in collision contrary to public policy, and are not the contracts for such insurance void, for as, by these contracts, the insurer is only bound to pay what the vessel insured should pay, negligence in the vessel insured, is a pre-requisite to a recovery by its owner on the policy.

To the second argument the answer is similar: Equity as thus used can mean only natural justice. It was never a rule of natural justice to impute to one the tort of another in which the former did not participate. It was a rule of law of gradual growth, but a rule of expediency, not of equity.

The quotations from the French authors should be carefully scrutinized. Their strictures are upon the rule limiting the liability of the owner for the contracts of the vessel. This is carefully guarded against by our statute.

The third objection is based upon the dangers growing from this construction.

The practical danger is nothing. There is already a special insurance against collision. It has never been found that ship masters are for this reason more bent upon destruction.

Nor is there danger that in case of serious loss by collision the master of the guilty ship would be encouraged to strand her. He would never venture to do this without the privity of the owner, who would thus be without the pale of the act, and

whose fraud would prevent his collection of the insurance.

Finally, there are many practical checks upon such conduct of the master. He is committing a crime, he is putting at risk the lives of himself and of his crew to save to his owners a fund in which he has no interest, and in which they dare not allow him to share, and all for nothing since his vessel is insured against the consequences of negligent collision.

(*f.*) *Since the decision of this Court in the case of Norwich Co.* vs. *Wright* (13 *Wall.*, 104), *there has been a practical unanimity of opinion, whenever the question has been presented, that insurance is not an interest in the vessel.*

"Indeed, the language of the statute seems to "render it impossible to raise such a question. "Plainly the words of the act do not cover the in- "surance money, and the absence of any allusion "to insurance is significant. It is difficult to be- "lieve that such money would not have been dis- "tinctly mentioned if there had been any inten- "tion to include it. * * * In the second place "the amount received for the insurance did not "arise from or out of the vessel, but out of certain "contracts of indemnity made by the owners of "the vessel, to which contracts the freighters were "not parties."

Matter of Petition of N. & N. Y. Trans. Co. (8 Ben., 317, 318).

"The owners of the cargo could have proceeded

"against either vessel, but one having been de-
"stroyed, the liability of the owners of that ves-
"sel was limited to her value." Lowell, *Circuit Judge.*

The C. H. Foster (1 Fed. Rep., 734).

"Has not Congress the further power, having
"entire control over the remedy, to prescribe that
"in such cases the remedy shall be *in rem* only
"against the ship and not *in personam;* that the
"damages to be recovered in this class of marine
"torts in the Admiralty Courts of the United
"States shall be limited to the value of the ship
"and freight, and if the fund is not sufficient
"to pay all claims upon it, that it shall be equitably
"distributed among the claimants? It seems to
"me, therefore, competent for Congress, while
"making the jurisdiction of the Admiralty Courts
"exclusive in this class of maritime causes, to
"direct the court to exercise that jurisdiction only
"*in rem* and not *in personam;* to provide for this
"class of marine torts, that there shall be a remedy
"only against the ship and freight, or, if against
"the person, only to the value of the ship and
"freight." Choate, *J.*

In re L. I., etc., Trans. Co. (5 Fed. Rep., 612, 613).

"The subject to be surrendered is the interest of
"the owner in the vessel and freight. Not a word
"is said of transfer of insurance. A transfer of
"property is not *ex proprio vigore* a transfer of
"the policies of insurance thereon.

"There is nothing in the Act of Congress to in-
"dicate that the transfer of the interest of the
"owner to a trustee, was intended to have any dif-
"ferent effect from that of an ordinary transfer of

"personal property, which, neither in law or in "equity, carries with it insurance, or any collateral "contract. It seems to me, therefore, that were I "to hold that the owners are responsible, not only "to the extent of the value of the vessel and her "freight, but also for the insurance collected, I "should, in fact, interpolate in the statute words "which Congress refrained from using, and extend "the liability beyond the limit prescribed. * * * * "I may add, that, after reflection, I am "unable to perceive that the proceeds of fire "insurance are any more liable for the claims of "creditors than those of marine would be." Strong, *J.*

Matter of Petition N. & N. Y. Trans. Co. (17 Blatch, 234, 237).

So Mr. Justice Blatchford, in delivering judgment in the Circuit Court (*Record, p.* 55), said:

"I think it sufficient to rest the question on the "plain language of the statute. The interest in "the vessel, which is the measure of liability * * * "does not extend to what is not an interest in the "vessel."

And to the same effect is the decision of Nelson, *J.*, in *The City of Columbus* (22 Fed. Rep., 460), since, we believe, affirmed in the Circuit Court on appeal.

All these cases, however, but reiterate the reasoning of the first case under the act, and reach the same result.

Watson vs. *Marks* (2 Am. Law Reg., 157).

"As the marine policy is a merely personal con- "tract between the insurer and the assured, so the "rights of action which flow from it in case of loss

" are strictly personal also. It is not, it never was
" an interest in the thing insured. In case of total
" loss, the rights of the assured to recover by force
" of it, spring up and have their being only from
" the moment when his interest in the thing ex-
" pired."

(*g.*) *Although this question has never been, in terms, adjudicated by this Court, its utterances in construing this statute have been, it is submitted, inconsistent with any construction of the act extending the ship owner's liability to the insurance upon the ship.*

" By the maritime law the liability of the ship
" owner was limited to his interest in the ship and
" freight for all torts of the master and seamen,
" whether by collision or anything else, and some-
" times even for the master's contracts, and his
" liability was so strictly limited, that he was dis-
" charged by giving up that interest, or the vessel
" being lost on the voyage (p. 119).

" We do not hesitate to express our decided con-
" viction, that the rule of the maritime law on
" this subject, so far as it relates to torts, was in-
" tended to be adopted by the Act of 1851 (p. 127).

" * * * In order to proceed regularly, the
" Court must have possession of the limited liabili-
" ty fund, that is, the proceeds or value of the
" ship and freight (p. 124).

"* * * If the vessel were libelled and either
" sold or appraised and her value deposited in
" Court, this sum, together with the amount of

"freight (when proper to be added) would consti-
"tute the *res* or fund for distribution" (p. 124).

Norwich Co. vs. *Wright* (13 Wall., 104).

"It may be added that the owners of the vessel
"found in fault may often not know the amount
"of damage and loss sustained by the other vessel
"and her cargo. It may * * * turn out to be
"much greater than the value of their own vessel
"and the freight pending thereon. * * *

"The counsel for the appellees is mistaken in
"supposing that the value of the offending vessel
"at the time of the collision furnishes the only
"criterion of the amount for which her owners are
"liable. In *Norwich Co.* vs. *Wright* (13 Wall,
"104) we held that the owners of the offending ves-
"sel could, under the statute, discharge themselves
"from personal liability by surrendering the ship
"and freight. This would imply that the value of
"the ship at the time of the surrender (with the
"addition of the pending freight), if the surrender
"is made in a reasonable time, would furnish a
"proper criterion of the amount of liability."

The Benefactor (103 U. S., 239).

"It is sufficient to say that the law does not re-
"quire this. It contains two distinct and inde-
"pendent provisions on the subject; one is that
"the ship owner shall be liable only to the value
"of the ship and freight; the other is that they
"may be discharged altogether by surrendering
"the ship and freight."

The Scotland (105 U. S., 24).

"Such being the case, we cannot say that the
"Court (upon the showing here made) has not ac-

" quired jurisdiction of the thing about which the " litigation arises, to wit, the fund to be appor- " tioned among the parties who may prove to be " legally entitled thereto. It has the freight money " in its possession, and the trustee is in a position " to gather up the remnants of the vessel, if it has " not already been done."

Ex parte Slayton (105 U. S., 451).

" The rule of limited liability presented by the " Act of 1851 is nothing more than the old mari- " time rule administered in Courts of Admiralty in " all countries except England from time immemo- " rial. * * * Cases might occur, it is true, " in which the ship owners could avail themselves " of those benefits by way of defense alone, as " where both ship and freight are totally lost, so " that the owners are relieved from all liability " whatever. * * * *

" When cases arise in which the vessel and " freight have been totally lost, and no District " Court has or *can* have possession of any fund to " distribute, resort may probably be had with " propriety to the District Court of the district in " which the owners reside, or where the vessel " perished."

Prov. S. S. Co. vs. Hill Mfg. Co.
(109 *U. S.*, 578.)

(*h.*) *The policies of insurance effected on the Great Western by her owners were not effested for the benefit of the libellants; but if they had been, this fact would be entirely immaterial, and could not increase the limit of the respondent's liability for the collision stated in the pleadings.*

Since the contract of insurance is a personal contract of indemnity insuring, not the subject matter, but persons interested in it, whether any one is insured will be a question of fact depending upon the intention of the parties. The broad scope of the general clause describing the insured is quite immaterial; if it were not the intention of the person effecting the insurance to include a class of persons, they will not be protected by the insurance.

"Questions have been raised as to the parties "who may avail themselves of the very broad and "comprehensive terms of this clause. In the first "place, it is clear they must be persons who at "some time or other during the risk have an in- "surable interest in the property, the original "parties and their assignees. Beyond this, it "must be shown that the person giving the order "to effect the insurance either intended it for their "benefit or, at all events, did not intend it exclu- "sively for the benefit of others having a conflict- "ing or inconsistent interest, but that it was meant "to apply generally so as to cover the interest of "those who should ultimately appear concerned; "if this be shown, a subsequent adoption of the "policy by the parties so intended to be insured, "or so appearing ultimately concerned in interest "will be held equivalent to a previous order, and "entitle them under the words of the general "clause to avail themselves of the benefit of the "insurance.

"The intention at the time of the party who di- "rects the insurance to be effected is the great "point to be ascertained in determining whose in- "terests the policy can be applied to protect; and

" this point is to be ascertained by the verdict of a " jury on the evidence adduced in the cause."

1 *Arnould. Marine Insurance* (pp. 109, 110).

(1.) Assuming that they had an insurable interest, the libellants are not within the terms of the policies effected upon the Great Western.

For the subject matter of insurance, never at any time during the pendency of the risk "appertained in part or in all" to the libellants.

The subject matter of insurance appertains only to those who have an interest in it. A tort may give rise to a lien upon the guilty vessel, but that lien is not an interest in the vessel; the vessel does not by any use of language appertain to the lienor.

(2.) They are excluded by the terms of the policies.

For the contract on its face insures only the owners who effected the insurance and those in privity with them, not those whose interests are adverse.

This is plain from the collision clause. By this clause, those interested in any ship or vessel which might be injured by collision with the Great Western through the steamer's negligence are contrasted with the assured under the policy. They are the persons against whose claims the assured under the policy are indemnified and the assured are to be indemnified by a payment to them of the amount which they have paid by way of damages to the injured parties. The assured under the policy must therefore be those whose interests are

adverse to the libellants. The libellants are excluded from its benefits.

(3.) The finding of the Circuit Court is that the insurance was effected by the owners and to that finding there is no exception.

(4.) There was no request to find as matter of fact, or of law, that the insurance upon the Great Western covered the lien of the libellants thereon for collision.

But whatever might have been the form of insurance, and whatever might have been the intention of the parties, it is wholly immaterial in this suit.

It is a necessary consequence from the nature of the contract of insurance that whether the insurance is, or is not in terms broad enough to cover any particular person, the latter's rights under the policy will depend, not upon his ownership of the subject matter, or his interest in it, or his lien upon it, but on the terms of the particular contract; that is, whatever may be his rights in or to the subject matter, these, in themselves, give him no rights upon the policy. His right to recover upon the contract is based wholly upon the fact that he is a party to it or in privity with a party to it; if he is not specifically named in the policy and wishes to take advantage of the general clause, he does so by becoming a party to it, adopting the contract, and ratifying the action of the person effecting the insurance, which is equivalent to a previous order.

If, under these circumstances, the original assured under the policy whose interest has either ceased or become subordinate, collects the insurance, he may become a trustee for those actually entitled.

His liability to them, however, for these proceeds arises not from the cause of the loss under the policy, though the cause of that loss may be his own tort or a tort imputable to him. The sole ground of his liability for the insurance is his collection of the proceeds.

In other words, if the policies on the Great Western, the amount of which was collected by the owners, had covered any lien of the libellants for collision, the liability of the insurers on the policies would arise from the stranding of the steamer, but the liability of the owners to the libellants for the proceeds collected by them would have absolutely no connection with the tort causing the loss; and if the libellants were to recover this amount from the owners, they would recover it, not in a cause of tort for collision by way of damages for the collision, but in an action of contract in which the owners were charged as trustees with funds collected by them for the libellants' benefit.

Such a recovery is not possible in this action.

(1.) It is, to say the least, very questionable whether a Court of Admiralty would have jurisdiction of such a cause of action.

(2.) This is a cause of tort and damage, while any non-equitable action against the owners seeking to charge them as trustees of the libellants would necessarily be founded on contract; the libellants could not, at any time, have been entitled to the immediate possession of the policies, and could not therefore have brought trover for their conversion.

(3.) The insurance was not collected by the owners until after the institution of this action, and any cause of action growing out of such collection and arising after the institution of this suit cannot be enforced in this cause.

(4.) The decision of such a controversy would depend upon an issue of fact not raised by the pleadings, and which the respondent had no opportunity to litigate, and would violate the well-settled rule of admiralty that the recovery must be *secundum allegata et probata.*

There remains the possible suggestion, that assuming a policy in this form to insure all interest and liens, such insurance would thereby become an interest in the subject matter.

This overlooks the essential nature of the contract of insurance.

The test is, whether the insured recovers on the policy because he is a party to the contract or in privity with a party thereto, or because of his interest in, or lien upon the subject matter.

His lien upon the subject matter might, at most, vest in him an insurable interest enabling him to make a valid contract of insurance. His rights to the insurance depend upon the contract, to which he must be a party directly, or make himself a party. Until he becomes a party to it, he has no interest in it. The policy, therefore cannot, whatever be its form, be an interest in the subject matter of insurance.

Second.—The liability of the respondent for the collision stated in the pleadings is limited to the sum of $1,796.14, the value of the Great Western (and her pending freight), after her stranding and wreck on the night of March 25th, 1876.

(*a.*) *By the general maritime law, the liability of the ship-owner was limited to his interest in the ship and freight for all torts of the master and seamen, whether by collision or anything else, and his liability was so strictly limited that he was discharged by giving up that interest, or by the vessel being lost on the voyage.*

The City of Norwich (supra).
The Scotland (supra).
The Phebe (supra).
The Rebecca (supra).

and the cases and authorities there cited.

(*b.*) *The rule laid down by the Continental authorities as the rule of the maritime law, with which they agree, is to the same effect.*

"The rule of the maritime law thus recognized " by the Supreme Court of the United States has " also been recognized by the legislation of many " foreign countries, viz. : Portugal, Holland, Ham- " burg, Denmark (*Code of* 1683), Sweden and Nor- " way (*Ordinance of* 1667), Russia, the two Sicilies, " Malta in the Lombardo Venetian Kingdom, Sar- " dinia, the countries governed by the ordinance of

" Bilboa, that is, Mexico and the republics of South " America and by Prussia." *Benedict, J.* (*Record, p.* 21.)

And see the Continental authorities cited under the first point.

(c.) *The Act of* 1851 *adopted this rule of the maritime law for the cases to which the act applies.*

" We do not hesitate to express our decided " conviction that the rule of the maritime law on " this subject, so far as relates to torts was in- " tended to be adopted by the Act of 1851" (p. 127).

Norwich Co. vs. *Wright* (13 Wall., 104).

" The rule of limited liability presented by the " Act of 1851, is nothing more than the old maritime " rule administered in Courts of Admiralty in all " countries, except England, from time imme- " morial."

Prov. S. S. Co. vs. *Hill M'fg. Co.* (109 U. S., 451).

" But whilst the rule adopted by Congress is the " same as the rule of the general maritime law, its " efficacy, as a rule, depends upon the statute and " not upon any inherent force of the maritime " law" (p. 29).

The Scotland (105 U. S., 24).

(*d.*) *Interpreted and administered as statute law, this rule of the maritime law remains unchanged. The act has provided that for these maritime torts a recovery* in personam *shall not be greater than a recovery* in rem.

(1.) The Revised Statutes provide for three classes of cases:

"The liability of the owner of any vessel (1) for "any embezzlement, loss or destruction by any "person of any property, goods or merchandise, "shipped or put on board of such vessel, or (2) for "any loss, damage or injury by collision, or (3) for "any act, matter or thing done, occasioned or in- "curred without the privity or knowledge of such "owner or owners, shall in no case exceed the "amount or value of the interest of such owner in "such vessel and her freight then pending" (§ 4283).

Since the provisions of sections 4284 and 4285 apply to all these cases (*Norwich Co.* vs. *Wright*, 13 *Wall*, 104), they are placed upon the same footing, not merely in the measure of the ship owner's liability therefor, but as well in the method by which that limitation of liability is to be obtained. The liability of the ship owner for collision is no greater than his liability for loss of cargo carried in his own ship.

This equality of liability is absolute. The statute does not, in case of collision, throw the risk of the safe arrival in port of the offending vessel upon the owner, and in the case of damage to cargo upon the shipper; the possibility of such an inference is negatived by the fact that a single rule is laid down as generally applicable to all cases.

And as the words in section 4284, "whenever any

such embezzlement, loss or destruction is suffered by several freighters or owners of goods, wares or merchandise, or any property whatever, on the same voyage," include losses by collision (Norwich Co. *vs.* Wright, *supra*), the act has contemplated the contingency which has happened in this case, and has provided for it.

(2.) Other provisions of the act are inconsistent with any other rule than that of the maritime law.

α. The provisions of section 4284 cover and apply to all the cases specified in the preceding section (4283), for which the ship owner's liability is limited.

There are included not merely losses suffered by freighters of cargo, but also losses suffered by the owners of innocent vessels through collision.

The City of Norwich (13 *Wall*, 104, *p.* 123-25).
The Scotland (105 *U. S.*, 24).
Admiralty Rules 54, 55, 56, 57.

β. The act contemplates successive losses occurring in a single voyage, not merely losses to several persons arising out of the same tort, and it is quite immaterial that all should belong to the same one of the three classes specified in section 4283.

The ship owner's liability is not a separate liability to the freighters of cargo to the value of his interest in the vessel and freight, and a separate liability to the same amount to persons injured by

collision, and so on. It is a gross liability for all classes of losses.

All losses within the scope of the act occurring on the same voyage are put by section 4284 upon the same footing of equality. They share in the limited liability fund, not in the order in which a Court of Admiralty would marshal the respective liens therefor, but in proportion to their amounts.

The right to equality in payment out of the fund depends, by the express terms of the statute, not upon the fact that the losses were the consequence of the same disaster, nor because they occurred at the same time, but because they occurred during the same voyage of the offending vessel. During the same voyage of the vessel, no loss has precedence.

This construction is rendered necessary by the terms of section 4284.

The Act, 53 *Geo. III*, *c.* 159, which was the first English act which, in terms, limited the liability of the shipowner for collision, expressly provided in the third section that if there were several distinct losses on one voyage or a loss after the end of one voyage and before the commencement of another, each loss should be adjusted as if no other loss had occurred.

This provision which was in force at the time of the enactment of the Act of 1851, was not only omitted from our statute, but the case of successive losses by collision was put in the same category and subjected to the same rule as the case of losses by freighters, whose cause of action cannot be enforced until the termination of the voyage.

γ. Necessarily, therefore, the value of the vessel at the time of any particular loss or injury

(unless the voyage is thereby terminated in the destruction of the guilty vessel), cannot be a matter of consequence in determining the liability of the shipowner.

There cannot be, for each loss, a varying limit of liability, since all the losses are to be paid out of a single fund, which is applicable equally to the payment of the second loss as the first and of the third as the second. The fund must therefore be fixed in amount and must be applicable to the payment of the damages for all the successive torts.

δ. As a consequence, any person suffering injury from a maritime tort, must necessarily take the risk of the navigation of the guilty vessel from the time of the commission of the tort until the termination of the voyage.

For, by the provisions of section 4284, he must continue liable to have the fund out of which his claim is to be paid, the vessel and freight, subjected to claims for subsequent torts entitled to rank on an equality with his own. The fund cannot increase, because the liability under the act is not cumulative. And as his share in the fund may thus be reduced to a nominal sum, it may equally well be reduced to nothing by the loss of the guilty vessel in a subsequent tort on the same voyage.

The gross liability of the owner for all the torts cannot therefore exceed the value of the guilty vessel as rescued from the last disaster of the voyage, that is, at the time of her restoration to her owners.

ε. The vessel and freight, the limited liability fund, are not to be valued either at the com-

mencement of the voyage or immediately before the commission of the first tort.

The City of Norwich (supra).
The Scotland (supra).

It is their value as rescued from the torts of the master which furnishes the limit of liability.

They must therefore be valued at the termination of the voyage—a conclusion in harmony with the words of section 4284, "if the value of the vessel and her freight *for the voyage*," etc.

(3.) Still other provisions of the statute make the same conclusion necessary.

α. The act provides a single limit of liability in all the cases to which it relates, viz.: the amount or value of the interest of the ship owner in the vessel and her freight pending, but provides two methods by which its benefits may be obtained.

"The primary enactment in section 4283 is that "the liability of the owner for any loss or damage, "without his privity or knowledge, shall in no case "exceed the amount or value of his interest in the "vessel and her freight, then pending.

"Two modes for carrying out this law are then "prescribed—one in section 4284 and the other in "section 4285."

The Scotland (105 *U. S.*, 24).

β. If the limit of liability is the same, there can be no greater liability if the ship owner elects to plead the limitation than if he elects to transfer or surrender the ship and freight.

The value of the interest which he would have to transfer is the limit of his liability under his plea. In the one case he transfers the thing itself; in the other, he is chargeable with its value. The act gives no warrant for applying a different limit of liability to different cases. A single limit of liability is fixed for all cases. This is recognized by the Admiralty rules, which, in case of affirmative action by the ship owner, provide, as an alternative for the surrender of the owner's interest in the guilty vessel and her pending freight, the appraisal of the value of that interest, and the payment of such value into court. The provisions of section 4285 are not restrictive, but enabling.

γ. The right to the remedy provided by section 4285 does not depend upon the rescue of the guilty vessel, or its continued existence in specie. The subject of the transfer may be simply the stranded débris or the hulk at the bottom of the sea. Damaged or not damaged, lost or not lost, the interest of the owners therein may still be surrendered and transferred.

The City of Norwich (supra).
The Benefactor (supra).
The Scotland, (supra.)
Ex parte Slayton (105 U. S., 578).

δ. The mode of relief afforded by section 4285 must consequently be applicable to every case under the act; that is, in every case where the right to a limitation of liability exists, this mode of obtaining the benefit of the act is open to the ship owner.

Those persons who may plead the limitation, may,

at some time, exercise the right conferred by section 4285. This right, it is true, may doubtless like any other right, be waived, but it exists in every case, until waived either expressly, or impliedly, by operation of law from some act, neglect, or omission on the part of the ship owner.

ε. In the absence of anything constituting a waiver, either directly or by implication, the right to surrender must continue for a reasonable time.

It must therefore continue, at any rate, until the shipowner has notice of the loss or damage inflicted and further until he has had an opportunity to ascertain the facts attending the loss or damage. (*The City of Norwich*, 13 *Wall.*, 104. *The Benefactor*, 103 *U. S.*, 239). Necessarily, therefore, it continues until the guilty vessel once more comes into direct communication with her owner and under his control, or in other words, until she reaches port. To say that the right does not continue until this time, is practically to deny its existence in most cases.

" In *Norwich Co.* vs. *Wright*, we held that the " owners of the offending vessel could, under the " statute, discharge themselves from personal lia- " bility, by surrendering the ship and freight. " This would imply that the value of the ship at " the time of the surrender (with the addition of " the pending freight), if the surrender is made in " a reasonable time, would furnish a proper crite- " rion of the amount of liability."

The Benefactor (supra).

And note the language of the last sentence of

§ 4285, which plainly contemplates a delay in making the transfer until after suit brought.

η. Any omission or act, to constitute a waiver of the right to the remedy provided by this section, must necessarily be some omission or act of the ship owner.

A subsequent wrongful act or a subsequent wrongful omission on the part of the master in the management of the vessel on the same voyage and before the owner has again regained control of her, cannot deprive the ship owner of the remedy provided by this section ; since there are, in the first place, none of the elements of a waiver ; and, in the second place, it is the object of the statute to protect the owner from the consequences of such act and such neglect while his vessel is not in his possession or under his control.

θ. During the interval, therefore, between the commission of the tort and the end of the same voyage, the vessel must necessarily be at the risk of her creditors.

(4.) A similar conclusion will be reached by continuing the argument from section 4285.

The right to surrender under the fourth section of the Act of 1851, was independent of the number of successive torts committed; these successive torts could not be deemed a waiver of this right.

The surrender was a sufficient compliance with the act and therefore with the fourth section of the act. This right would continue until a reasonable time after the commission of the last tort, that is,

until the vessel once more came under the control of the owner, either by the termination of the voyage, or the voyage being broken up by her destruction.

The fund therefore would necessarily be during this interval at the risk of the injured persons, not merely of the master's torts, but of the perils of the seas.

(*e.*) *The stranding of the Great Western on the night following her collision with the Daphne and while proceeding on her voyage is therefore without effect.*

There is no reason for distinguishing in principle between a subsequent total loss of the vessel through negligent stranding, and a subsequent total loss through a collision caused by negligent navigation.

The maritime law treated both alike, and in both cases relieved the owner from further liability. In either case, the *res* is destroyed ; in both cases, it is the master's negligence which is the primary cause of the loss, and it is against that very negligence that the act is intended to protect the ship owner.

The steamer was laden with a cargo which by the stranding was totally lost, actually or constructively, and on which no freight was ever paid, and the owners of the Great Western are thus brought within the very words of section 4284.

(*f.*) *The purpose of the act requires this construction.*

The underlying principle of the act is the principle of the maritime law that the owner and master do not stand toward each other in the relation of principal and agent, and that it is only to the extent of the property which the owner has entrusted to the master, that he can be held liable for the latter's torts.

Its object and purpose is to restrict the liability of the owner to the value of the capital which he imperils in the enterprise. This interest in a vessel is compared to the interest of a stock holder in a company. He is not exposed to personal liability beyond the amount of capital in his venture.

The City of Norwich (supra).
The Scotland (supra).

To accomplish this purpose, the act adopted the rule of the maritime law. Congress legislated with reference, not to the English but to the maritime theory; and the protection afforded by the statute to the owner against the torts of the master, must be presumed to be co-extensive with that afforded by the maritime law, which contemplated and provided against the contingency of the subsequent loss of the guilty vessel, after her rescue, uninjured, from the first tort. The act did not leave a *casus omissus* in which its apparent benefit might prove illusory, and the ship owner lose his vessel and also be liable for her torts.

"The general principle of the maritime law and "of our statute, is that the ship owner exposes to "loss resulting from the faults or neglects of the "the master and crew, only the property entrusted

" to them, and can free himself from liability for " such faults and neglects, by surrendering such " property in the shape in which it comes back to " him from their hands, so long as no privity or " knowledge on his part attaches to any such fault " or neglect, or to any disaster which has befallen " the vessel during the voyage.

" In accordance with this principle, the statute " allows an opportunity for such surrender. It " could not be made in this case between the time " of the collision and the time of the stranding. " The risk of the loss of the offending vessel is " thrown, for the benefit of commerce, on the " owner of the property damaged by her, so that " if she is lost on the sea, her value shall not be " again lost to her owner."

Blatchford, J., (Record, p. 52–53).

THIRD.—The provisions of the Revised Statutes are a simple re-enactment of the Act of 1851.

The revision has not, in section 4285, restricted the right of limitation by transfer to the case of a single tort occasioning the losses against liability for which the limitation is sought.

Congress in the first section of the revision prescribed the rule for its construction :

" In determining the meaning of the Revised " Statutes or of any act or resolution of Congress " passed subsequent to February 25th, eighteen " hundred and seventy-one, words importing the " singular number may extend to and be applied

"to several persons or things, words importing the "plural number may include the singular," etc., etc.

By the act directing the revision (Laws 1866, Chap. 140), the commissioners were appointed "to revise, simplify, arrange, and consolidate all statutes of the United States," etc., and the mode in which this duty was to be performed was pointed out by the second section of the act which provides that, in performing this duty, the commissioners shall bring together all statutes and parts of statutes, which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments, and making all such alterations as may be necessary to reconcile the contradictions, supply the omissions and amend the imperfections of the original text.

Acting upon these instructions, the commissioners collected the statutes relating to commerce and navigation, and grouped them under a single title.

As the Act of 1851 would not exist in the Revision as a separate act, it became necessary to substitute another phrase for that used in the fourth section, "a sufficient compliance with the requirements of this act on the part of such owner or owners."

For this they substituted the phrase "a sufficient compliance on the part of such owner with the requirements of this title relating to his liability for any embezzlement, loss or destruction of any property, goods or merchandise."

That is, the transfer under section 4285 should be deemed a compliance only with such parts of the title as bore relation to the limitation of liability of shipowners.

The revisers also broke up the fourth section of

the Act of 1851 into two sections of the Revised Statutes, but we have not been able to find a case which holds that this requires a different construction of the language.

The legal rules governing the construction of revisions of statutes are well settled.

"An enactment in its nature declaratory of the "common law will be construed as far as may be, "according to common law. * * * On a "like principle, revisions of statutes are to be inter- "preted as were the statutes revised."

Bishop on Written Laws, § 144, p. 131.

"Where statutes are revised as is common in our "States, to render them more convenient and plain, "the revision is to receive the interpretation which "has been given to the old laws except where the "contrary intention affirmatively appears. One of "the objects of the revision having been to im- "prove and make uniform the phraseology, slight "changes of language will not work changes of "meaning."

id. § 98.

"As the revision embraces that act as well as all "others on the subject, it is by the express lan- "guage of the repealing clause §5,596, no longer in "force. Counsel for Government admitting that it "is no longer in force, independently of the sec- "tion of the revision which we are called upon to "construe, insist that a resort may be had to the "law which was the subject of the revision to in- "terpret anything left in doubt by the language of "the revisers.

"This principle is undoubtedly sound, and

"where there is a substantial doubt as to the "meaning of the language used in the revision, the "old law is a valuable source of information. The "Revised Statutes must be treated as the legis- "lative declaration of the statute law on the sub- "jects which they embrace on the 1st day of De- "cember, 1873.

"When the meaning is plain, the Courts cannot "look to the statutes which have been revised, to "see if Congress erred in that revision but may do "so when necessary to construe doubtful language "used in expressing the meaning of Congress. If "then in the case before us the language of sect. "5280 was fairly susceptible of the construction "claimed by the Government as well as of the op- "posite one, the argument from the provision of "the statute as it stood before the revision would "be conclusive."

United States vs. *Bowen* (100 U. S., 508, 513).

"On these differences of language," said Mr. Justice Blatchford, "it is contended that the Re- "vised Statutes exclude a limitation of the liabili- "ty of a part owner to the value of his interest in "the vessel and freight, and do not provide for any "limitation short of the interest of the owner or "owners collectively in the whole vessel. There "is no force in such a contention. * * By sec- "tion 1 of the Revised Statutes, it is provided that "in determining the meaning of the Revised "Statutes, words importing the singular number "may extend and be applied to several persons or "things, and words importing the plural number "may include the singular. It was undoubtedly, "because of this general provision that the lan-

"guage of the Act of 1851 was condensed in the "revision. Read by the light of such general pro- "vision, and in view of the principles on which the "revision was made, it must be held that the new "language in sections 4283 and 4285 is the result "merely of revision, simplification, rearrangement "and consolidation, with a view to the re-enact- "ment of the same substance and meaning." (Record, p. 53.)

citing *Murdock* vs. *City of Memphis* (20 Wall., 590–617). *Smyth* vs. *Fish* (23 Wall., 374). *U. S.* vs. *Claflin* (14 Blatch. C. C., 55). *The L. W. Eaton* (9 Ben., 289, 298–303).

FOURTH.—The decree appealed from should be affirmed with costs.

FOSTER & THOMSON,
Proctors for Appellee.

E. C. HENDERSON,
JAMES THOMSON,
Advocates.

118-520

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SUPREME COURT OF THE UNITED STATES.

JENS THOMMESSEN ET AL., OWNERS OF THE NORWEGIAN BARK DAPHNE,

vs. No. 333.

MARK WHITWILL.

BRIEF ON QUESTION OF INSURANCE, SUPPLEMENTAL TO BRIEF FILED ON BEHALF OF APPELLANTS HEREIN IN CASE OF NATIONAL STEAM NAVIGATION COMPANY vs. DYER.

HENRY T. WING,
Proctor for J. THOMMESSEN *et al.*

HARRINGTON PUTNAM,
Advocate.

Supreme Court of the United States.

JENS THOMMESSEN and JULIUS SMITH, Owners of the Norwegian Bark DAPHNE, Appellants, *vs.* MARK WHITWILL, Respondent.	No. 333.

Supplemental Brief for Appellants on the question of Insurance.

Libellants herein beg to refer to the brief already submitted on their behalf, by leave of Court, in the case of the National Steam Navigation Company *vs.* Dyer, on December 24, 1884.

The general question of the effect of insurance upon the injuring vessel in proceedings to limit the liability of its owners for consequences of collision at sea has there been considered.

When an abandonment (*délaissement*) of the vessel has been made to the insurers by the owner, a different question arises. The act of the shipowner transferring his title and interest to the underwriter for the purpose of collecting his insurance, cannot leave his position unchanged toward the ship's creditors.

A distinguished French author cited in the former brief, very lately published the following views on this question:

"A delicate and complicated question of quite another sort is that of the relations of the *abandon* to creditors with the *délaissement* to insurers, when the ship is insured.

There is no doubt and no possible controversy as to the consequences of the *délaissement* as far as the ownership is concerned. Article 385 of the Code de Commerce puts it in express terms: "The subjects of insurance *belong* to the insurer from the moment

of the *délaissement.*" It is, therefore, an absolute transfer (*dépossession*) of the ownership, which is made to the insurer. This right of ownership is often illusory when the ship is lost, destroyed or wrecked. The right remains—the right to the wreckage, to the freight saved, the right to look to third persons proved to be responsible for the loss, the right to the proceeds of sale, in case the ship has been sold, the right to what may ultimately be found of a ship which has disappeared without being heard from, the right to a captured ship which has been restored (*à la restitution du navire capturé*), the right to an indemnity obtained, by the terms of treaties of peace, on account of the capture or destruction of vessels. As I write, there is still going on in the United States, after twenty years, an open liquidation of indemnities connected with the destructive operations of the cruiser "Alabama" during the War of the Rebellion.

Now, how could the owner, divested of the right of property by the *abandon* to creditors, still transfer to the insurers by the *délaissement* this same right of property?

Logically, grammatically, according to common sense, it is not possible.

It is to be noticed that the same accessories and the same rights of recourse attend the transfer of the vessel. According to Article 216, the *abandon* to creditors includes the freight. According to Article 386, the *délaissement* to insurers includes the freight.

It is also to be noticed that both proceedings are optional, open to the free choice of the owner. The *abandon* is a privilege of exoneration, the *délaissement* is also such a privilege—does not the exercise of the one exclude that of the other?

There is only one satisfactory solution of the difficulty. The *abandon* to creditors should include in the accessories of ownership and in the rights of recourse connected with it, the rights of recourse against the insurers, or the rights which exist under the policies of insurance. Then all would be right. The owner who should prefer to preserve his rights against the insurers would refrain from the *abandon* and pay his debts.

In the discussion of the law of 1841 in the Chamber of Peers, the proposition was made by M. Persil, formerly Minister of Justice, and strongly supported. The answer was that the contract of insurance was a thing foreign to creditors, *res inter alios acta*, and that the premium was paid out of the *fortune de terre* of the owner.

Both reasons were bad. It is not true that the insurance premium is taken from the *fortune de terre.* If the accounts of all the shipping houses, of all the merchants of the world, were examined, it would be seen that the premiums of marine insurance are always entered as charges and expenses of the maritime venture and paid out of the capital of the venture. So truly is this the case that, even in shipping firms which do not have their vessels insured, an insurance account is opened which receives premiums which are a charge upon the annual profits. More than this, insurance premiums are always, as a matter of fact, in-

cluded in the insured value, in conformity with Article 342 of the *Code de commerce:* 'The insured may have the cost of insurance insured.' (*L'assuré peut faire assurer le coût de l'assurance.*) Thus they make a part of the sea fortune (*la fortune flottante*), which is protected by insurance." Alfred de Courcy—*Questions de Droit Maritime,* Third Series, pp. 306–9 (1885).

Logically, all the indemnities to which the owner is entitled, *as owner*, must pass with the vessel, whether they arise from tort or contract.

Suppose that after collision the offending vessel is voluntarily stranded in an effort to save cargo. Can the owner transfer the mere wreck and retain to himself the average contribution payable by the owner of cargo saved?

Suppose the offending vessel is itself destroyed by collision with a third vessel in a subsequent independent casualty. Can the owner transfer the wreck and still recover and keep full compensation?

If indemnity for capture or destruction be awarded by the general government, is the money, for that reason, to be kept from creditors of the vessel?

All of these payments to the owner make good his proprietary interest in the offending vessel, and must therefore be applied to the satisfaction of the claims upon that interest. All accessory proprietary rights of indemnity are *pars rei*, and are to be surrendered with the vessel or as its substitute.

Insurance compensation also is paid as indemnity.

The earliest record of insurance is found in instances in which the Roman State promised and paid indemnity for losses that might be sustained by transport or grain ships.

Emérigon, *Traité des Assurances*, 1783, *tome* 1, pp. IV & V.

Payment of premium, therefore, was no part of the original idea of insurance—the essential of which is indemnity—whether purchased, earned, promised by individuals, or granted by sovereign power.

Insurance as a business—growing up outside of legislative regulation, treated as a wager by jurists, condemned as usury by the canonists—has long evaded close legal scru-

tiny, being regarded, or rather disregarded, as a mere hazard tolerated on grounds of commercial expediency.

If there is any reason at all why the shipowner, who is required to give up all the incidents of his ownership, can except therefrom the proceeds of his insurance, it must be the survival of this wager theory of the insurance contract.

The argument that the insurance contract is *res inter alios acta* has no bearing after an abandonment to underwriters, by which the creditors' rights are divested and the insurance contracts brought directly before the Court.

From the moment of collision the libellants had a lien upon the steamship *Great Western* for the amount of their damages. By the terms of the policies in question, that lien has been expressly insured.

> The policies read to "John Jupe, or as agent, as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain, in part or in all."

Libellants, therefore, contend:—

That under the terms "ship and freight" are embraced every accessory and substitutionary indemnity paid to the shipowner. Insurance is such an indemnity and cannot be withheld from the collision creditor on historical, logical or equitable grounds.

By an abandonment of the *res* to the underwriters, the insurance contracts have been submitted to the Court, and cannot be deemed *res inter alios acta.*

Insurance indemnity makes good the losses sustained by the shipowner's interest as much as does general average contribution. In many cases these claims to indemnity are the only elements of that interest that have substantial money value. To omit them in valuing that interest would lead to a result wholly fictitious and illusory.

Such a defective and false administration could not be justly charged to the omissions of the statute. The term *interest* is broadly comprehensive. Nothing accessory, incidental, or collateral escapes its definition.

HARRINGTON PUTNAM, of Counsel.